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RELIGION AND LAW*

THERE is a message of great power in the sacred solemnity of this occasion, in the reverential demeanor of this distinguished assembly, in the solemn enactment at the altar of " the mystery of faith," the Mass. There is a message of inspiring power in the beauty of this altar and in the Gothic grace of this cathedral. The stones believe in God. As it were, they breathe his praise.

You of the legal profession are especially sensitive to this speechless eloquence for you are fashioned by the experience of the humanist and Christian heritage that is the common law. That heritage fashioned by saints and scholars has the power to humanize and christianize a man, and it is at work in your midst. We are pleased by your presence, inspired by your faith, edified by your achievement, and we pray that the Holy Spirit whom you invoke in church will abide with you in the courts all the days of your lives.

Your presence gives added distinction to this venerable and hallowed cathedral. It offers to you its most precious gift the grace of the Mass to assist you in the pursuit of justice. Your public act of worship gives glory to God, edification to the community, and stirs our hearts anew with the vision of the City of God.

The " Red Mass " is an old and noble tradition of your profession.

* Following is the text of the sermon delivered by the Very Reverend Monsignor John J. Dougherty, S.T.L., S.S.D., professor at Immaculate Conception Seminary, Newark, N. J., at the annual Red Mass sponsored by the New York Guild of Catholic Lawyers in St. Patrick's Cathedral on Sunday, October 14, 1956.

It befits the Law never to forget religion, for it is religion's child. In its first days it walked with God. The foundation of the revealed religion of Israel was the Mosaic code of laws, delivered on the awesome heights of Sinai's desert mountain. The heart of that code is the Ten Commandments, the apodictic laws, of which the book of Exodus says, " And the Lord . . . gave to Moses two stone tables of testimony, written with the finger of God ".[1] The Mosaic code embraced not only ritualistic and moral laws, but social and economic as well. It was *the* law of the community; the whole life of the people was directed by it, and its sanctions were fixed by the divine revelation. In later times as in earlier, Israel's kings were Israel's judges. David and Solomon, were God's chosen and anointed ones, and they exercised judgment among the people.

The idea of divine origin of law is seen in more ancient pagan cultures. In the Louvre Museum of Paris stands the black diorite column that is the code of Hammurabi, that masterpiece of ancient jurisprudence. Almost four thousand years ago the moral, social and economic laws of old Babylonia were incised in this stone. At the top of the column there is a relief of King Hammurabi receiving the code from Shamash, the sun god, divine patron of justice.

Hammurabi called himself the King of Law, and declared that he had been called by the gods to establish the welfare of mankind, to create justice in the land, to destroy the wicked and the perverse, that the strong may not oppress the weak. But this religious legal culture he had inherited from an earlier civilization, the Sumerian, the oldest civilization known to man. " In Sumerian times the city temple was the law court and the supreme source of jurisdiction, and men brought their wrongs and their disputes before ' the throne of the god.' " [2]

As religion is the basis of culture so is it the parent of law. In later times the court was separated from the temple, and the law came to dwell in its own house. Still religion was the

[1] Ex. 31:18.

[2] C. Dawson, *The Age of the Gods*, 128.

support of the law. Law is the essence of the Roman civilization, and Rome strengthened its law by giving it heavenly origin and religious forms, by making crime a disturbance of the order of heaven, and by putting behind all oaths the authority of Jove. It bequeathed to Europe its majestic system of laws. The preservation of Roman law and the completion of its development we owe to the Christian Emperor Justinian. Through his great code the inheritance of Roman jurisprudence was handed on to the medieval world. The medieval revival of Roman law at the famed University of Bologna influenced the growth of the new Canon Law which played such a great part in the formation of medieval Christendom. Bologna—*Bononia docta*—was the legal teacher of Europe, from it, in the words of Pope Honorius III, " went forth the leaders who rule the Christian people." [3] Canon Law has been called " the nurse and tutor of the common law " of the Anglo-Saxon tradition,[4] and the moving spirit behind the Magna Carta was a religious personality, Cardinal Stephen Langton, Archbishop of Canterbury. One of your colleagues recently wrote that " the formative days of American jurisprudence are reminiscent of the great days of the Magna Carta." [5] In the dark of present uncertainties as a consolation and an inspiration shines the luminous certainty of the past: Law is religion's child.

Religion that begets canon and civil law is more than both. It must be more than the letter, " for the letter killeth, but the spirit quickeneth." [6] True religion must add to observance of the law the inner spirit. The nature of this inner spirit is first described in the burning eloquence of the prophets of Israel. They beheld their people observing the outward formalities of law and ritual and forgetting the demands of social justice, the ethical aspects of religion. Twenty-seven centuries ago Isaias spoke these lines for God:

[3] C. Dawson, *Religion and the Rise of Western Civilization,* 228.

[4] J. C. H. Wu, *Fountain of Justice,* 65.

[5] Wu, *op. cit.,* 128.

[6] 2 Cor. 3:6.

Is this such a fast as I have chosen,
for a man to afflict his soul for a day?
Is this it, to wind his head about like a circle,
and to spread sackcloth and ashes?
Wilt thou call this a fast,
and a day acceptable to the Lord?
Is not this rather the fast that I have chosen?

Loose the bonds of wickedness
Undo the burdens that oppress;
Let them that are broken go free,
and break asunder every burden.
Deal thy bread to the hungry,
and bring the needy and harborless into thy house.
When thou shalt see one naked cover him
and despise not thy own flesh.
Then shall thy light break forth as the morning,

And thy justice shall go before thy face,
and the glory of the Lord shall gather thee up.[7]

This cry of the prophets, muted for centuries, rang out again when Jesus came. Incensed at the extremes of sham and cant to which religious legalism has led, he cried out, "Woe to you, Scribes and Pharisees, hypocrites! because you pay tithes on mint and anise and cummin, and have left undone the weightier things of the Law, right judgment, and mercy and faith." [8]

The earliest emphasis in the preaching of Jesus was the need of *metanoia,* a change of heart. Hard upon this came his penetrating emphasis on true religious values, the primacy of the spirit over the letter. Religious legalism had converged upon the Sabbath with a welter of casuistic laws. This conflict between letter and spirit is sharply drawn in an account in the gospel of St. Mark: "As he (Jesus) was going through the standing grain on the Sabbath, his disciples began, as they went along, to pluck the ears of grain. But the Pharisees said to him: Behold why are they doing what is not lawful on the

[7] Is. 58:5-8.

[8] Matth. 23:23.

Sabbath . . . And he said to them, The Sabbath was made for man and not man for the Sabbath. Therefore the Son of Man is Lord even of the Sabbath." [9] He drove his message deeply and sharply into the heart of a man, made inner motivation the soul of religious action, and excoriated those who "clean the outside of the cup and the dish, but within are full of robbery and uncleanness." [10] When a Scribe said to Jesus, "to love one's neighbor as oneself is a greater thing than all holocausts and sacrifices," he replied, "Thou art not far from the Kingdom of God." [11]

By dramatic action and incisive speech Jesus laid bare the fallacy and illusion of religious legalism and formalism. He did more. He proclaimed the insufficiency of the very Law of Moses. In the Sermon on the Mount he took the position of one who was master of the Law. When we remember the veneration in which that Law was held, we understand why "the crowds were astonished at his teaching." [12] Six times at the beginning of the Sermon he repeated the words, "but I say to you" after he had quoted the Old Law with the formula, "You have heard that it was said to the ancients."

He took the position that day in Galilee of one who was master of the Law, not its destroyer, for he said, "Do not think that I have come to destroy the Law or the Prophets. I have not come to destroy, but to fulfill." [13] And how did he fulfill? He brought the Law to that perfection which was its goal in God's design. The Law prescribed purity of the flesh; he asked purity of heart. The Law prescribed love of neighbor; he asked love of enemies. He summed up his New Law in the Golden Rule, "All that you wish men to do to you, even do you also to them; for this is the Law and the Prophets." [14]

[9] 3:23-28.

[10] Matth. 23:25.

[11] Mark 12:33.

[12] Matth. 7:28.

[13] Matth. 5:17.

[14] Matth. 7:12.

Jesus asked of his followers more than human virtue and more than human sacrifice. To men whose eyes had witnessed the horror of Roman crucifixion he said, "He who does not carry his cross and follow me, cannot be my disciple." [15] He could make these demands upon his followers because his religion was to be more than letter and law. It was to be the gift of new love that would be "the fulfillment of the Law." [16] The life of this new love would be given when a man was "born again of water and the Holy Spirit." [17] Then Paul could say with truth, "Do you not know that you are the temple of God and the Spirit of God dwells in you." [18] The effect of this new love, this grace, would be an inner freedom, for as Paul said, "where the Spirit of the Lord is, there is freedom." [19] This freedom is not some sort of mystic license, but rather an inner life heavy with fruit, for "the fruit of the Spirit is charity, joy, peace, patience, kindness, goodness, faith, modesty, continency. Against such things there is no law." [20]

Gentlemen of the law, the substance of your profession is justice, the essence of your lives is love.

Let us pray. *Veni Sancte Spiritus.* Come Holy Spirit, fill the courts as you fill this house, not with "a sound from heaven as of a mighty wind," [21] but with the mighty silence of your presence. Come, Advocate Divine, fill the hearts of thy lawyers with the spirit of truth. Come, Consoler Blessed, spread thy bright wings over the bent world and by the fires of thy love in us renew the face of the earth. Amen.

[15] Luke 14:27.

[16] Rom. 14:10.

[17] John 3:5.

[18] 1 Cor. 3:16.

[19] 2 Cor. 3:17.

[20] Gal. 5:23 f.

[21] Acts 2:2.

THE DEDICATION OF PROPERTY TO THE FIXED PATRIMONY OF A CHURCH*

THE Canon Law on alienation of church property has been very competently discussed before the national meetings of this Society on two occasions in recent years. At the 1951 meeting in Denver, Father Danagher presented a paper [1] on the subject, which paper was later printed privately. Father DeWitt's essay,[2] read at Omaha in 1953, was issued in a reprint after publication in *The Jurist* for October 1954.[3] I could add nothing to the excellent and complete practical treatment which the topic received at the hands of Father DeWitt and Father Danagher.

However, certain points of canonical theory, which underlie the practical rules, may not be clearly understood. Thus the concepts of "fixed patrimony" and of "the dedication of property to a fixed patrimony" receive little explicit treatment in the standard commentaries. Yet without a clear grasp of these concepts, it is difficult to take the first step in applying the canons on alienation, by determining what property of a church is affected by those canons.[4] Therefore the sug-

* Paper read by the Reverend William F. Cahill, J.C.D., St. John's University, Brooklyn, N. Y., at the eighteenth annual National Convention of The Canon Law Society of America, held at the Hotel Claridge, Atlantic City, N. J., October 23-24, 1956.

N.B. The present text is the first part of this article; the second part will appear in the July quarterly of the current year.

[1] Rev. John J. Danagher, C.M., J.C.D., *The Canon Law of Alienation As It Affects Chancery Office and Parish Administration.*

[2] Rev. Max George DeWitt, J.C.D., *The Alienation of Church Property.*

[3] 14 *The Jurist,* 394 (1954).

[4] See Byrne, *Investment of Church Funds,* 26 (1951); Cleary, *Canonical Limitations on the Alienation of Church Property,* 9 (1936); Doheny, *Practical Problems in Church Finance,* 42-50 (1941); Heston, *The Alienation of Church Property in the United States,* 72 (1941); Stenger, *The Mortgaging of Church Property,* 89 (1942).

gestion was made that this meeting might find some interest in a discussion concentrated upon the fixed patrimony and the dedication by which property is incorporated into the fixed patrimony of a church.

In carrying out this suggestion, we do not underestimate the importance of other aspects of the Canon Law on alienation. It is only for the sake of being able, in the short time allowed here, to discuss adequately the canonical doctrines on fixed patrimony, that we give no direct attention to the types of contract forbidden, the measure of property values established, and the specific solemnities enjoined by the laws governing alienation.

Part I

THE CONCEPT "FIXED PATRIMONY OF A CHURCH"

The basic question to which our discussion is addressed is this: what property is subject to the canons which prescribe "solemnities" when church property is to be alienated? Leaving the question of the property's value out of consideration, we answer that property which belongs to the fixed patrimony of a church is subject to those canons. That answer provokes another question: why do you describe such property by the term "fixed patrimony", which appears nowhere in the Code of Canon Law, rather than by the phrase "*res ecclesiasticas immobiles aut mobiles, quae servando servari possunt*" which the Code employs in its leading canon [5] on alienation?

Our apology for thus departing from the language of the Code comprises the first major division of this paper. The burden of that apology may be stated briefly. When it is properly construed, the phrase "immovable church property and movable church property which does not perish in use", accurately describes the property whose alienation is governed by canons 1530 and following. But the same property is more lucidly described by the term "fixed patrimony".

[5] Can. 1530, § 1.

A somewhat detailed exposition of the meaning of the phrase "*res ecclesiasticas, immobiles aut mobiles, quae servando servari possunt*" is necessary because the phrase may be mistakenly understood to exclude from the contemplation of the canons on alienation church property which is incorporeal (and therefore neither movable nor immovable in a strict sense), as well as church property which is consumed when it is used (and which, therefore, *servando servari non potest*), and to extend the application of those Canons to all church property which is immovable or nonfungible. Examination of the true import of the phrase of canon 1530 will justify the employment of the term "fixed patrimony" to describe the property which a church is bound to hold in stable tenure.

A. Incorporeal Property Is Not Excluded from Canon 1530

Canon 1497, describing church property, employs the classical enumeration of the general types of property. All property is either incorporeal or corporeal, and corporeal property is either immovable or movable. But when one turns to canon 1530, he finds no term describing that class of property which is incorporeal. The all-inclusive term of canon 1497 is "*bona ecclesiastica*"; the generic term employed by canon 1530 is "*res ecclesiasticas*". Because the two canons differ in their enumeration of property types and employ different generic terms, the reader may question whether incorporeal property, included in canon 1497's "*bona ecclesiastica*", is excluded from "*res ecclesiasticas*" in canon 1530.

The terms *bona, res, property* and *goods*, all of which describe the objects of ownership, have had different content at various periods of legal history. *Res* and *bona*, though they had, in the earlier Roman Law, a more restricted meaning, came, in the post-classical period, to include incorporeal properties, called "*jura in re aliena*" or "obligations", as well as

corporeal property, movable or immovable.[6] These terms have that same broad sense in modern Civil Law.[7] In the Code of Canon Law, that same ample extension is explicitly given to the term *bona* when *bona ecclesiastica* are defined in canon 1497. The term *bona ecclesiastica* is used in canon 1534 to describe church property unlawfully alienated, while the same canon and the other canons on alienation use the term *res ecclesiasticas,* or simply *res,* when they speak of inalienable church property. It seems, therefore, that the Code, at least in the legislation on inalienable property, uses the terms *res* and *bona* interchangeably.

To translate *res* and *bona,* we use the word *property.* That word, in spite of its limited extension in some contexts,[8] has

[6] "*Bona,* as a whole, embraces not only corporeal things but also rights and debts".—Berger, *Encyclopedic Dictionary of Roman Law,* s.v. *Bona,* Vol. 43, pt. 2, Transactions of the American Philosophical Society, N.S. (1953).

"... the law of things, or property, is so much broader in Roman Law than in our own law. It includes not only property in its ordinary sense, but also all rights in property, including obligations, that is contracts and delicts (torts) .... Under the Roman classification, not only are such 'things' property, or '*res*', as are usually designated property by us, but also servitudes, both praedial and personal, likewise rights of *emphyteusis, superficies,* and *pignus;* and, in addition, rights arising either from contract or delict .... However, after all, it would seem that from the point of view of the Roman jurists themselves the whole law of '*res*' was, instead of the law of 'things' as ordinarily understood by us, the law of 'rights'. In other words, under 'corporeal things' they considered the right of ownership, or the right of dominion in one's own property, and under 'incorporeal things' they discussed rights in the property of another, '*jura in re aliena*'."—Burdick, *The Principles of Roman Law and Their Relation to Modern Law,* 310-311 (1938).

[Res] "(i)ncorporales autem sunt, quae tangi non possunt; qualia sunt ea, quae in iure consistunt, sicut hereditas, ususfructus, usus, obligationes quoquo modo contractae. Nec ad rem pertinet, quod in hereditate res corporales continentur; nam et fructus qui ex fundo percipiuntur, corporales sunt, et id, quod ex aliqua obligatione nobis debetur, plerumque corporale est, veluti fundus, homo, pecunia. Nam ipsum ius hereditatis, et ipsum ius utendi fruendi, et ipsum ius obligationis incorporale est."—*Institutiones Justiniani,* 2, 2, 2.

[7] In French Law, *biens,* property, may be incorporeal, corporeal, immovable or movable.—Quemner, *Dictionnaire Juridique,* Français-Anglais, s.v. *Biens* (1953).

[8] In the matter of the rules against perpetuities and against unduly prolonged suspension of the power of alienation, "property" has reference to

been accepted by the courts of the United States to connote incorporeal rights, as well as immovable and movable things, as the objects of ownership.[9] The word *goods*, on the other hand, has a very limited connotation in American legal usage.

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tangibles, real or personal, and not to such incorporeal things as choses in action and contract rights. See, e.g. *Kingston* v. *Home Life Ins. Co.,* 11 Del. Ch. 258, 101 Atl. 898 (1917), aff'd. Sup. Ct. Del., II Del. Ch. 428, 104 Atl. 25 (1918).

[9] "The term 'property' is said to be *nomen generalissimum* and to include everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value, or which goes to make up one's wealth or estate."—*Wapsie Power & Light Co.* v. *City of Tipton,* 197 Iowa 996, 193 N.W. 643, 645 (1923). The court there was applying a state statute which authorized the City to purchase "property", and held that purchase of a contract right was authorized. The term "property" in the Federal Bankruptcy Act, in the sections forbidding transfer of assets by a prospective bankrupt, was held to cover a note which the holder had negotiated (*Samet* v. *Farmers and Merchants' National Bank of Baltimore,* C.C.A. Md. 247 Fed. 669, 671 (1917)). Under succession statutes, rights to receive income from a trust fund have been held to be "property" (*Globe Indemnity Co.* v. *Bruce,* C.C.A. Okl. 81 F. 2d 143, 150 (1935)). In construing that clause of the Fifth Amendment of the Constitution of the United States which forbids that any person be deprived of "property" without due process of law, the courts have held the following rights to be "property" protected by the Constitution: a chose in action—the right to damages, to be recovered in a civil action, for false imprisonment (*Griffin* v. *Wilcox,* 21 Ind. 370, 373 (1863)); air mail contracts with the government (*Boeing Air Transport Inc.* v. *Farley,* 75 F. 2d 765, 65 App. D.C. 162 (1935), followed in *Pennsylvania Airlines Inc.* v. *Farley,* 75 F. 2d 769, 64 App. D.C. 166, cert. denied 294 U.S. 728 (1935)); the rights of union members under the union's contract with the employer for a "closed shop" (*Nissen* v. *International Brotherhood,* 229 Iowa 102, 295 N.W. 858 (1941)). A contractual right has been held to be protected by that clause of the same Amendment which regulates exercise of the power of eminent domain (*Johnson* v. *United States,* 79 F. Supp. 208, 111 Ct. Cl. 750 (1948)). Chief Justice Marshall thus construed Art. I, Sec. 10, cl. 1, of the Federal Constitution: ". . . the state legislatures were forbidden 'to pass any law impairing the obligation of contracts', that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself . . ." (*Dartmouth College* v. *Woodward,* 17 U.S. (4 Wheat) 510, 536 (1819)). The decision of the Supreme Court of the United States in the Oregon School Case affirmed injunctions forbidding enforcement of the state laws as improper interference with the business interests of the appellees, among which interests the Court enumerated prospective income from tuition fees, long-term contracts with teachers and parents, and the good will of the pupils' parents (*Pierce* v. *Society of Sisters,* 268 U.S. 510, 532, 533, 536 (1924)).

It never describes realty and it does not, except in peculiar contexts, connote bonds or certain other movables, or incorporeal property.[10] Therefore, we do not employ the word *goods* to translate *res* or *bona*.

The development of our argument requires repeated reference to the logically constructed categorization of property which the Canon Law has adopted: *incorporeal property* and *corporeal property* are the generic divisions; *immovables* and *movables* are species under the genus *corporeals*. This strict categorization of property has no parallel in the American law. *Real property* and *personal property* are sometimes used as rough approximations of *immovables* and *movables*. But one must keep in mind that *real* and *personal* were first adopted as terms descriptive of the actions by which property could be recovered; they did not then, nor do they now, refer precisely to the movable quality of property, so that *realty* and *personalty* do not accurately parallel the dichotomous division of *corporeals* into *immovables* and *movables*. Nor are *real* and *personal* significant of a clear dichotomy of property classes: leases and other interests in land not of freehold character are called "chattels *real*", yet these properties are said to pertain to their owner's "*personal* estate". While an American lawyer may use the term *incorporeal* as an adjective to characterise a property in which the object owned is a *right*, and the term *corporeal* similarly where it is a *thing* that is owned, he does not use these terms to signify a dichtomous generic classification of property. He will categorize incorporeal properties by specific designations: "choses in action", "contract rights", "incorporeal hereditaments", etc.

In canon 1530, *res ecclesiasticas* is modified by the terms *immobiles* and *mobiles* which have direct reference only to corporeal property. The use of these modifiers might be understood to limit the broad extension which *res ecclesiasticae* has when it is taken as the equivalent of *bona ecclesiastica*, and the conclusion might be drawn that all incorporeal prop-

[10] See *Cate* v. *Merrill*, 116 Me. 235, 102 Atl. 235 (1917).

erty of a church is freely alienable. But examination of the background of the phrase used in canon 1530 leads to a contrary conclusion.

The phrase of canon 1530, "*res ecclesiasticas immobiles aut mobiles, quae servando servari possunt*", which describes the character of church property whose alienation is forbidden, derives from the laws which were in force in the Church before the Code of 1918. The older law, exemplified in the Decree of Paul II,[11] *Ambitiosae,*[12] explicitly prohibited alienation of only corporeal property, which was termed "immovables and precious movables", and explicitly excepted from the prohibition only "*fructibus et bonis, quae servando servari non possunt pro instantis temporis exigentia.*" Canon 6[13] declares that we are bound, in three cases, to construe the canons of the Code in a sense conforming to that in which approved authors interpreted the law of the Church before the Code. The three cases are: when the canon to be construed repeats the old law in its entirely; when we are construing a canon which retains, in some part, the old law; and when we are construing an enactment of the Code which probably, though not certainly, repeats the earlier law. From what has been said of the text of *Ambitiosae,* it is at least probable that canon 1530, in its determination of the type of church property subject to the solemnities of alienation, repeats the pre-Code legislation. Therefore we must look to the doctrine of the older canonists on this matter when we construe the phrase "*res ecclesiasticas etc*".

Addressing himself to the question of the alienable character of shares, bonds, instruments of debt and causes of action, Pirhing[14] adverts to the fact that *Ambitiosae* and other pertinent decrees described the property whose alienation they

[11] Reigned 1464-1471.

[12] Ex. Comm. 3, c. un. *de rebus ecclesiae non alienandis;* confirmed by decrees of Urban VIII, 7 Sept. 1624 and Pius IX, 12 Oct. 1869.

[13] Nn. 2, 3, 4.

[14] 3 Pirhing, *Jus Canonicum,* 120, Lib. 3, Tit. 13, n. 12 (1759).

forbade in terms of immovables and precious movables. Pirhing [15] points out that shares, etc., are incorporeal property. Therefore, he said, alienation of these incorporeal rights was not directly forbidden by the decrees. But he then asserts that these incorporeal rights are accessory to corporeal properties, and he concludes that the alienability of the rights depends upon the standing of the corporeal property which they represent. If the right had immovable property for its object, then the right, though it was an incorporeal property, was inalienable. But if the right was one through whose exercise a movable and alienable property could be reduced to possession, the right itself could be aliened without solemnity. Schmalzgrueber,[16] Reiffenstuel,[17] and Wernz [18] agree with the substance of Pirhing's reasoning and conclusions.

Therefore we must include among the property which canon 1530 makes inalienable any right which the church possesses and which can be exercised to put the church in possession of a corporeal property which will then be inalienable.

B. No Corporeal Property is Excluded from or Included in Canon 1530 by Reason Only of Its Character As Immovable, Movable, Fungible or Nonfungible

The phrase "*res ecclesiasticas, etc.*" in canon 1530 may seem to exclude from the canon's intent, not only incorporeal property, but also corporeal property which is fungible. We have seen that the former apparent exclusion arises from the omission in canon 1530 of the term *incorporeal* which appears in canon 1497's enumeration of the classes of church property. Canon 1530's clause "*quae servando servari possunt*" may seem to exclude from the canon's scope property which is fungible. Further, in the context of "*res ecclesiasticas immobiles aut mobiles*", the clause "*quae servando servari pos-*

[15] *Id.* at n. 14.

[16] 3-1 Schmalzgrueber, *Jus Ecclesiasticum Universum,* 446, Tit. 13, n. 29 (1844).

[17] 3 Reiffenstuel, *Jus Canonicum Universum,* 179, Lib. 3, Tit. 13, n. 9 (1760).

[18] 3-1 Wernz, *Ius Decretalium,* 181, n. 160 (1908).

sunt" may be taken to have the effect of making the canon applicable to all immovables and nonfungibles.

As in the matter of canon 1530's seeming exclusion of incorporeal property, application of the principles of canon 6 by examination of the pre-Code commentaries demonstrates that canon 1530 does not place outside the law on alienation all fungibles in the ownership of a church, nor subject to the solemnities of alienation all immovable and nonfungible church property. Canon 1530's description of property whose alienation is subject to the solemnities derives from the pre-Code decrees, and the clause "*quae servando servari possunt*" clearly had its origin in the distinction made in the decree of Paul II. That decree, *Ambitiosae,* described the freely alienable property of the church by referring to "*fructibus et bonis, quae servando servari non possunt pro instantis temporis exigentia*". Yet the commentators, with this decree before them, held that alienation of fungibles was subject to canonical solemnities in some circumstances, while in other circumstances immovables and nonfungibles could be freely alienated.

Money, at least in the form of coin or currency, is a fungible because its only proper use is as a medium of exchange, and when it is so used money perishes so far as the person using it is concerned—it passes out of his possession quite as completely as does the oil he burns in a lamp. So obvious is this fungibility of money, that the verb "to spend" which primarily means to consume by use in any manner, has come to describe distinctively the use of money in exchange.

Yet, arguing from a principle which may be denominated the doctrine of property representation, Pirhing [19] taught that the money of a church was inalienable if it had been set aside to purchase immovable property, or if the money had been received as the sale price of an immovable or precious movable property. The second case he explains in these terms: "(The money price) is subrogated to the position of the property sold and represents that property; therefore, as the im-

[19] 3 Pirhing, *op. cit. supra* note 14, at 120, n. 13; see also 3-1 Schmalzgrueber, *op. cit supra* note 16, at 454, nn. 51, 52; 3 Reiffenstuel, *op. cit. supra* note 17, at 179, n. 15.

movable or precious movable property could not have been sold without the solemnities required by law, so the money acquired by its sale cannot (be alienated) ". Aside from such circumstances, Pirhing held money freely alienable, and he gives this reason—that money as such is acquired and saved only to be spent. It was this expendable quality in the nature of money which led Pirhing to conclude that incorporeal properties, such as shares, bonds, instruments of debt and causes of action, when they were the means by which money could be reduced to possession, were freely alienable. These incorporeal rights were accessory to the property they represented, and if that property, as money to be freely expended, was alienable, then the rights by which it could be claimed were also alienable. Lest it seem that we have misrepresented Pirhing's doctrine, it should be noted that he did not consider the case where incorporeal rights represent money, which money, in its turn, represents an inalienable property to be purchased or a property which has been sold with the solemnities of alienation. Yet the inalienability of an incorporeal right representing such money necessarily follows from application of the doctrine of representative property.

Pirhing [20] also applies the doctrine of representative property to reach the conclusion that where money which can be freely spent is converted into an immovable property, that immovable is freely alienable.

The other pre-Code commentators [21] agree with Pirhing in these matters. The law on alienation which they explained is the same, in its description of inalienable property of a church, as the law of the Code. The pre-Code decrees were construed, through application of the doctrine of representative property, to permit immovable and precious movable church property to be disposed of freely in some circumstances and to forbid

[20] *Op. cit.* at 121, n. 18.

[21] See notes 16, 17, 18 *supra.*

alienation of fungible property in other circumstances. Therefore, we must not construe canon 1530 as forbidding alienation of all immovables and nonfungibles or as permitting alienation of all fungibles.

This doctrine of property representation is not inconsistent with the provisions of canons 1531, § 3 and 1539, § 2. The first of these enactments specifically directs that the money proceeds of an alienation shall be invested for the benefit of the church.[22] In the latter canon, recognition is given to the fact that paper securities held by a church may need to be exchanged for other similar securities from time

[22] In a case where the local Ordinary, acting under canon 1532, § 2, permitted alienation of jewelry left as votive offerings at a shrine and permitted the proceeds to be used for enlarging the shrine church, the S. Congregation declared that canon 1531, § 3 had been violated. " . . . pecunia retractata non statim erogari valet in usus etiam pios et necessarios, sed immo conservanda est *ad fructum;* ut ergo erogetur seu consumatur, licet ad amplificandam ecclesiam, ut in casu factum est, necessaria est semper Apostolicae Sedis licentia, seu dispensatio super obligatione hac, quam data lex in laudato canone perspicue et explicite, nullaque concessa exceptione imponit."—S. Congr. Concilii, 12 iulii 1919, 11 *Acta Apostolicae Sedis,* 416, 418 (1919). Ciprotti, *De alienatione bonorum ecclesiasticorum ad solvendum debitum,* 11 Apollinaris, 127 (1938), takes the position that, though a local Ordinary licensed a sale of the *bona* of a benefice under canon 1530, § 1, n. 2 and canon 1532, yet only a dispensation of the Holy See could authorize application of the proceeds of such sale to satisfy a debt which burdened the benefice. He reaches this conclusion on the principles established in the 1919 decision of the S. Congregation of the Council which is quoted above. The manifest sense of canon 1531, § 3 is restricted by S. Congr. Concilii, *Declaratio,* 17 Dec. 1951, 44 *Acta Apostolicae Sedis,* 44 (1952). The S. Congregation was asked " an pecuniae summa ex huiusmodi bonorum ecclesiasticorum alienationibus percepta, *sit collocanda in acquirendis bonis immobilibus* in commodum ecclesiae seu entis, cuius interest ". (Emphasis supplied.) And the reply, " Affirmative, non obstantibus contrariis quibusvis " was made with the Pope's approval. However, the effect of this declaration seems clearly to be limited to transactions governed by the decree of the same S. Congregation, 13 July 1951, which has force " perdurantibus praesentibus adiunctis ".—43 *Acta Apostolicae Sedis,* 602 (1951). See Vromant, *De Bonis Ecclesiae Temporalibus,* 253-254, n. 299 (1953); and Blat, *Commentarium Codicis Iuris Canonici, De Rebus,* 615, n. 455 (1934), who points out that the provisions of canon 1531 were drawn from the Instruction of S. Congr. de Prop. Fide, Ad Patriarch. Armen., 30 iulii 1867, *Collectanea,* n. 1310, 7 Gasparri, *Codicis Iuris Canonici Fontes,* 403, n. 4867 (1935).

to time. Such changes are subjected to control as "transactions of greater moment"[23] or as acts of "extraordinary adminstration",[24] and canon 1539 clearly implies that such changes are not alienations subject to the solemnities of canons 1530-1533. Neither of these two enactments permits to be diverted from the patrimony of a church funds which "represent" a fixed acquired patrimonial property; rather they both confirm the principle that newly acquired properties retain the character of the properties which they "represent".

Obviously, the doctrine of representative property is not violated where authority *competently* permits alienation of a representative property, dispensing the obligation of canon 1531, § 3, and permitting application of the representative property to a non-patrimonial purpose such as discharging debts or meeting the expenses of current operation. But license to sell or in other wise to realize money upon patrimonial property is not *de se* a license to alienate the proceeds of the transaction. This is a second alienation and will require a new license unless it was competently, and at least implicity, provided for in the licenses to sell, etc. That would be the case where the Holy See granted, "*juxta preces*", a petition which asked license to sell a church building so that the proceeds could be used for a purpose specified in the petition, as, for example, to build a new church, or to pay off a debt burdening an existing church edifice to which the functions of the church sold had been transferred.

An example may be helpful in understanding these principles. Applying what has been said concerning the doctrine of property representation to the case where a church edifice is sold, it follows that the money or other property obtained as proceeds of the sale is inalienable.

Now, assume that a parish church has not been sold or licensed to be sold, but has burned to the ground. At this moment, immediately after the fire, the parish has no longer

[23] Compare canon 1539, § 2 with canon 1520, § 3.

[24] Compare canon 1539, § 2 with canon 1527, § 1.

the immovable property which was the church, and it has not yet obtained money in compensation for its loss of the immovable. But the parish may have three different types of claim for money, all these claims arising out of the loss of the church. Supposing that the building was insured against fire, the parish has a contract right against the insurance underwriter for the amount of his contract. If the underwriter refuses to pay on the contract, the parish has a suit for damages against him, the damages to be measured by the amount of the contract. Or take it that the fire was negligently caused by the operator of a near-by power line. The parish has an action for tortious damage against the power company. In place of its corporeal property lost by fire, the parish has incorporeal property—contract rights or causes of action. On the reasoning of the canonists upon the doctrine of property representation, these rights to collect money are inalienable; the parish cannot assign its contract rights or its causes of action, or compromise its claims, without observing the solemnities required by the canons. The money subject to these claims, when the parish recovers it, will stand in the place of the consecrated building; it will have the same inalienable character as if it were the price for which the church edifice had been licensed to be sold. Since the property to which the contract rights or rights of suit can be reduced will be inalienable, the rights themselves are inalienable.

C. Canon 1530's Metonymous Description of the Inalienable Property

It has been shown that, though canon 1530 does not enumerate incorporeal property or corporeal property which is fungible, both incorporeal rights and fungibles may be governed by the canon. We have demonstrated also that immovables and nonfungibles, in spite of the enumeration of both these classes of property in the canon, may be freely alienable. One may, therefore, inquire why the canon contains any enumeration of property types; why its draftsmen were not

content to designate the property to which the canon refers by the term "*res ecclesiasticas*" without qualifiers or modifiers.

One answer is obvious; the draftsmen of the Code took up the language of the old decrees, which language carried with it by force of traditional construction, a special significance. This language, by force of tradition, described property whose substance a church as owner was bound to conserve and could not dispose of freely, while the use of the property and its fruits or profits were in the free disposition of the church. That was certainly the sense in which the pre-Code canonists construed the decrees on alienation.[25]

Canon 1530 must be construed, and is construed by commentators on the Code, in this same sense.[26] This construction of canon 1530 is sufficiently supported by application of canon 6 in respect to the pre-Code decrees and the commentaries upon those decrees.

But we may be aided in understanding the law, and in applying it, if we can see that this construction of its language is not arbitrary, nor even historical merely, but is warranted by the language itself. The primary meanings of the terms corporeal and incorporeal, immovable and movable, fungible and nonfungible, are easily understood. These primary meanings are those which follow directly from the nature of the properties. A property may be a right or a thing, a thing may be fixed in one place or not, and a movable thing may be spent or not by use.

The terms incorporeal, etc., have secondary meanings connoting the characteristic conduct of men who own the different kinds of property. The way in which owners treat their prop-

[25] See text *infra* at notes 30, 31, 32, 33.

[26] See Vromant, *op. cit. supra* note 22, at 249-250, nn. 295-296. Cf. 2 Coronata, *Institutiones Iuris Canonici*, 485, n. 1070, 1, a (1947); Heston, *op. cit. supra* note 4, at 72; 2 Vermeersch-Creusen, *Epitome Iuris Canonici*, 526, n. 851 (1927); Huot, "Bonorum Temporalium Apud Religiones Administratio Ordinaria et Extraordinaria", 32 *Commentarium Pro Religiosis*, 266, 268 (1955), citing Larraona, "Commentarium Codicis", 14 *Commentarium Pro Religiosis*, 186 (1932) and Bastien, *Directoire Canonique*, n. 334, nota 4 (ed. 4).

erty is determined in the first instance by the nature of what is owned. We expect a man who owns a right to reduce the right to a tangible property.[27] We expect a man to spend his money and other consumptibles, or, if he has more than he can usefully spend at a given time, to convert them either into a form which will assure their conservation or into property which will be useful to him or yield him income. The conduct of a miser, who hoards fungibles as such, is considered aberrational.

On the other hand, the owner of useful or productive property is expected to hold it more or less permanently and to carefully conserve its substance while he enjoys its use or spends the fruit or profit which it yields to him. An owner of such property whose chief enjoyment of it is in trading it for gain is called a speculator, in contrast to one who so trades in consumptibles and is called by the more respectable name of merchant, unless he deals in "futures".

This view, that permanent tenure characterizes normal ownership of useful or productive property, is recognized in our American tax laws. Under the United States Internal Revenue Code, a gain which occurs upon the sale of real estate or of securities is given favorable tax treatment as an increment to capital, unless it be shown that the sale was made in the course of the business of a dealer in land or in securities. Where one not acting as a dealer sells his residence, or a house he has held for rental, or sells stocks or bonds, the gain is taxed at the lower capital gains rate.[28] And if the residence sold is replaced at a cost at least equal to the sale price, the gain on the sale is not taxed, being computed as an element in the value of the new residence.[29]

[27] [Statutes of Limitations] ". . . are founded upon the general experience of mankind, that claims which are valid are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand creates, therefore, a presumption against its original validity, or that it has ceased to subsist."—Mr. Justice Field in *Riddlesbarger* v. *Hartford Ins. Co.*, 74 U.S. (7 Wall.) 257, 259 (1869).

[28] See Chapter 1, Subchapter P, especially Sections 1232, 1237, *Int. Rev. Code of 1954.*

[29] *Int. Rev. Code of 1954,* § 1034.

Thus it is a proper use of language to describe property in terms whose primary connotation is the nature of the property, not for the purpose of conveying that primary connotation, but to connote the permanence or impermanence of its owner's tenure. We believe that canon 1530 employs the phrase "*res ecclesiasticas*, etc." in such a metonymous sense. The phrase is used not to connote property to which the terms corporeal, immovable and nonfungible apply in their primary sense, but to connote property which a church as owner thereof is bound to hold permanently, not expending its substance, but enjoying its use and having free disposition of its yield.

While none of the commentators advance this metonymy as a general explanation of the canonical terms, the explanation is supported by the reasons which the writers [30] offer for classifying various properties as immovables or precious movables or fungibles under the terms of the decrees and of canon 1530.

To explain what were precious movables under the decrees, Pirhing did not refer to the relative value of the properties, but said they were "movable properties whose use and fruit may be enjoyed for a long time".[31] He then explains why, though the individual animals in a flock may be disposed of freely by sale or by slaughter, the flock is not to be alienated without the solemnities required by law: "for the church is wont to take yearly income from the flock, and that is possible because of the continued multiplication of young." He says

[30] "Pecunia numerata rei immobili vel mobili pretiosae emendae legitime deputata, vel quae habet annexum onus perpetuum vel diuturnum Missarum . . . solemnitates alienationis subiicitur."—Vromant, *op. cit supra* note 22, at 249, n. 295. "Res immobiles non reputantur domus vel areae quae, sive ex natura contractus sive ex intentione donatoris tantummodo *repraesentant pecunias solutas* ad usum cotidianum destinatas. . . . Cum alioquin domus istae vel aedificia . . . [exstrucatae vel emptae ut pecuniae quae ad capitale nondum pertinent modo valde frugifero occuparentur] . . . *pecunias solutas, sortem stabilem nondum ingressas, repraesentent,* opinamur quod procuratoribus licet supradicta aedificia postea libere vendere omissa qualibet alienationis solemnitate."—*Id.* at 250, n. 296 (Emphasis supplied). And see text *supra* at notes 19 and 20.

[31] 3 Pirhing, *op. cit. supra* note 14, at 120, n. 12; cf. 3-1 Schmalzgrueger, *op. cit. supra note* 16, at 448, n. 37.

trees are inalienable if they are fruitful, but if they are unfruitful or if they interfere with the fruitfulness of others, the trees may be cut down and their wood sold. Schmalzgrueber discusses property, immovable by nature, yet whose alienation is not forbidden, and he assigns this reason: because the property can afford no use or profit to the church which owns it.[32] He instances a house held by the church for rental income, where the cost of maintaining the house is greater than the rent, and real estate left to the Capuchins who are forbidden by law to hold property for income.[33]

Wernz,[34] writing a short time before the Code was promulgated, observed that paper securities must be included in the term " precious movables " used by the older decrees and their commentators and rendered in the Code as " *mobiles quae servando servari possunt* ". His reason is that the endowments of benefices and other ecclesiastical institutes are now often held in the form of such securities.

The doctrine of representative property,[35] by which incorporeal rights stand in the same legal position as the corporeal property they represent, and by which the source and destination of corporeal things determine them as immovables or precious movables, clearly supports the suggestion that the canonical terms " immovables " and " precious or nonfungible movables " are to be construed metonymously.

D. " Fixed Patrimony " Describes Church Property Held in Stable Tenure

The terms " fixed patrimony " and " fixed capital " are used by canonists [36] to describe property whose substance a church

[32] 3-1 Schmalzgrueber, *op. cit. supra* note 16, at 449, n. 39.

[33] *Id.* at 449, n. 40.

[34] 3-1 Wernz, *op. cit supra* note 18, at 181, n. 160.

[35] Cf. the clauses emphasised in the quotation from Vromant, *supra* note 30.

[36] Long ago, the term " *patrimonium* " was used to describe the endowment of a benefice.—Van Espen, *Jus Ecclesiasticum Universum*, 623, *De Rebus*, Pars 2, Sec. 4, Tit. 5, n. 27 (1766). " *Patrimonium stabile* " is used to describe

as owner is obliged to conserve, while that church freely enjoys the use of the property and freely expends the fruits and profits produced by the property. The obligation to conserve the substance and the freedom to dispose of use and yield are predicated with reference only to the law of alienation. Even the substance of such property may be disposed of if the solemnities prescribed are observed, but the solemnities are never required in disposing of the use and yield as such. Yet it should be noted that other laws restrict the use of church properties and the disposition of the income thereof. Thus, though the use or sale in question be not forbidden as an alienation, a movable or immovable blessed for use in worship cannot be put to an unworthy use,[37] and no sacred object can be sold simoniacally.[38] So also, the proceeds of church revenue, though not inalienable, cannot be given away without discrimination,[39] nor may administrators neglect to procure payment of revenue due their churches.[40] Among these restrictive laws, none operates so broadly as canon 1527 to inhibit dealings with church property, even those which are not subject to the solemnities of alienation. The canon makes not only unlawful but invalid any such dealing which exceeds the limits or fails to conform to the forms established for ordinary administration, unless the act be licensed in writing by

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church property subject to the solemnities of alienation.—Huot, *op. cit. supra* note 26, at 268. Such inalienable property is called "*Capitale fixum*".—2 Regatillo, *Institutiones Iuris Canonici,* 160, n. 303 (1949). Other writers designate such property or at least that part of it which represents invested money, as "*capitale stabile*".—2 Vermeersch-Creusen, *op. cit. supra* note 26, at 526, n. 851; 4-2 Wernz-Vidal, *Ius Canonicum,* 222, n. 757 (1935). The same endowment investments are called "*summa capitalis*" and "*sors stabilis frugifera*". —Vromant, *op. cit. supra* note 22, at 249, n. 295. This same concept is rendered in English as "invested capital".—Bouscaren-Ellis, *Canon Law,* 830 (1951). Another English translation is "stable, invested or fixed capital".—Doheny, *op. cit supra* note 4, at 42.

[37] Can. 1537.

[38] Can. 1539.

[39] Can. 1535.

[40] Can. 1523.

the local Ordinary. With these prohibitions we are not here concerned directly, but we mention them in order to point out that when we speak of property as being subject to free disposal we mean to indicate a relative freedom only—freedom from the solemnities of alienation.

Property which may be thus freely disposed of by church administrators is described as "*free* patrimony" or "*free* capital", in contrast to the "*fixed* patrimony" or "*fixed* capital" whose disposal is subject to the "solemnities".[41]

The word "patrimony" is used by the Code in canon 1522, n.3° to describe all the property resources of a church. The term "capital" is not used in the Code, but occurs in questionnaires returnable to some of the Roman Congregations.[42] There the term describes money resources, as distinct from immovable properties, but the forms issued by the Congregations indicate that these money resources are not subject to expenditure for the current needs of the church which is their owner. It thus appears that, though both terms connote church property held fixedly, "patrimony" is a broader term than "capital", as the former includes all types of property, while "capital" describes only money in one form or other.[43]

[41] Huot (*op. cit. supra* note 26, at 269) uses the contrasting terms "*patrimonium stabile*" and "*patrimonium liberum*". Doheny (*op. cit. supra* note 4, at 42, 45) explains the contrast between "stable, invested, or fixed capital" and "unstable, free, or fluctuating capital".

[42] The questionnaire to be answered by superiors general of religious in their quinquennial reports includes the following: "48. Num et quae bona, sive immobilia sive mobilia pretiosa abalienaverint, et qua facultate. 49. Num illorum bonorum, quae *capitalia* vocantur, partem aliquam consumpserint."—S. Congr. de Religiosis, Instructio, 25 Martii 1922, 14 *Acta Apostolicae Sedis,* 278, 281 (1922). The questionnaire to be answered by Ordinaries of mission territories includes the following: "XVI. De Bonis Ecclesiae. 1. Quinam sint *valor fundorum,* valor *capitalium,* et quae pecunia aliis credita . . . 2. De ratione accepti—Reditus bonorum immobilium . . . Pecuniae creditae . . . 3. De ratione expensi—Pro conservatione immobilium . . . Pro novis aedificiis . . . Sumptus pro foenere aeris alieni . . . Pecunia aliis mutuo data . . ."—S. Congr. de Propaganda Fide, Epistola, die Paschae Resurrectionis 1922, 14 *Acta Apostolicae Sedis,* 287, 307 (1922).

[43] Cf. notes 31 and 36, *supra.*

" Patrimony ", in the context of the law on alienation, always refers to property which is owned by a moral person in the Church and which is, therefore, " church property " in the sense of canon 1497. The law of alienation has no reference to anything which is not church property, not even to things which are devoted to uses which advance the work of the Church, but in which no church has a corporeal or incorporeal property right.[44] An example of dedicated things which are not church property is found in the resources of a lay association which is not a moral person in the Church, such as the St. Vincent de Paul Society.[45] Another example is a sum of money owned by a layman, or even by a diocesan priest in his individual capacity, which sum the owner is obliged to use for having Masses said.[46] Because the resources of the Society and the money for Masses are destined to pious purposes and are, therefore, governed by some of the canons

[44] 4-2 Wernz-Vidal, *op. cit. supra* note 36, at 225, n. 759, I.

[45] S. Congr. Concilii, Corrienten., 13 nov. 1920: " Votum Consultoris . . . Iuridica conditio Conferentiarum in genere . . . At neque pro statutis unquam requisita est approbatio auctoritatis ecclesiasticae, neque pro interna organizatione, neque unquam particulares Conferentiae *erectae* sunt per actum Superioris ecclesiastici aut praerequisita saltem eius approbatione . . . Orta ergo est et propagata tamquam *societas laica* i.e. non ecclesiastica seu non habens esse ab actu auctoritatis ecclesiasticae, sicut sunt *hospitalia laica* . . . Ita Societas nunquam curavit personalitatem iuridicam in Ecclesia habere; contra, eam procuravit obtinere ab auctoritate civili, ut haberetur capax recipiendi legata aliasque donationes . . . Iterum praestat praemittere quum Societas S. Vincentii a Paulo dicitur esse laica, a limine removendum esse ab hac appelatione sensum pravum quem nunc passim habet, et quem praeterito tempore omnino non habebat: *laicum* hic tantummodo per oppositionem dicitur ad *ecclesiasticum*. Iam notum est dari cappelanias *laicales* et *ecclesiasticas:* illae autem sunt, quae *sine auctoritate et approbatione ecclesiastica fundantur et idcirco* spiritualizatae non remanent, sed sub dispositione testatoris et heredum."— 13 *Acta Apostolicae Sedis,* 135, 136, 137, 138, 139. See English summary of this decree, 1 Bouscaren, *Canon Law Digest,* 714 (1934).

[46] Such a fund might constitute a lay chaplaincy (see preceding note, and can. 1412, n. 2), or the fund itself might be destined for direct distribution as manual stipends (cf. can. 826, § 1), or the fund might be destined to be transferred to a moral person in the Church to found a *fundatio pia* (cf. can. 1544 and can. 826, § 3).

of the Code,[47] these properties and others like them are said to belong to "the patrimony of the Catholic Church" and individual funds of this sort are described as "ecclesiastical patrimonies".[48] But because they are not church property, they are not in "the patrimony of a church", for the patrimony of a church, as appears from canon 1522, includes only that property which is in the ownership of a moral person in the Church and therefore in the custody of the administrator of that moral person. This distinction between "the patrimony of a church" and "an ecclesiastical patrimony" is warranted also by consideration of the teaching of the commentators on the Code who insist that alienation consists in transferring from the ownership of a church "*jura realia*".[49] "*Jura realia*" are property rights, whether corporeal or incorporeal, but these rights do not include personal or jurisdictional rights such as are exercised by the Church when it commands a person who holds Mass stipends, or who collects money for charity, to deal with those funds according to certain rules.

E. The Concept of Fixed Patrimonial Property Established in the Code

In construing canon 1530 as descriptive of that property which the canonists call "the fixed patrimony of a church", we are aided by the analogy between that property and the *bona* of benefices which the Code describes in Title XXV of its Third Book. A benefice is a church, in property matters.[50] Benefice property is church property in the strict sense of canon 1497. Beneficaries are administrators of churches and of church property, according to canon 1521.

[47] See can. 1513-1517.

[48] Petrocelli, *Il Patrimonio Ecclesiastico,* 24 (1940); Sabatini, *Il Patrimonio Ecclesiastico,* 546 (1934).

[49] Huot, *op. cit. supra* note 26, at 269, citing Larraona, *Schema lectionum circa jura patrimonialia realia,* 32, and Ruggiero, *Istituzioni di diritto civile,* 481-583 (1934).

[50] Can. 99, 1498.

Benefices are only one particular class of churches. But our argument here does not involve the fallacy "*ab uno dices omnes*". The argument is a deductive one, from analogy of law, and has for its major premise the principle of canon 20—matters provided for in no express legislation, shall be determined upon the rules drawn "*a legibus latis in similibus*". Therefore the enactments which expressly govern the fixed patrimonial property of a benefice are applicable to those aspects of the fixed patrimonial property of churches in general for which no canon expressly legislates.

It seems that our American parishes are founded under the exceptional provision of canon 1415, § 3, so that the pastors have the canonical office of *parochus*; though they have not funded benefices. This description of the pastor's legal status accords with the practice of many dioceses where the pastor is given a salary only. Yet many of our pastors have the right to receive certain fees and offerings, so perhaps they may be said to enjoy unfunded benefices, whose only property is incorporeal, consisting in the right to collect these fees and offerings.[51] The difficulty of correctly categorizing our American pastors and our local peculiarity of having no funded benefices are not directly pertinent here, but they are explicitly adverted to in order to sharpen our perception that a benefice is an "*ens juridicum*"[52] capable of possessing property rights. This perception is an element in the analogy to be made between the property of benefices and the property of other moral persons in the Church.

The canons which set forth the law applicable to the property of benefices clearly distinguish the substance, the use, and the yield, of the benefice property. The substance is designated by the terms *bona* and *dos*,[53] and the yield is called *fructus, reditus,* and *proventus*.[54]

[51] See can. 1410.

[52] Can. 1409.

[53] See, e.g., can. 1410, 1415, 1418.

[54] See, e.g., can. 1473, 1480.

Any kind of productive property which is offered to establish a benefice may be retained in the endowment, but if money is offered, the Code directs that it be held in the endowment in the form of realty or of securities.[55]

The substances of the property is to be restored at the beneficiary's cost if it is damaged through his fault, by negligence or otherwise.[56] The cost of managing the substance of the property and of collecting its fruits or profits are to be met by the beneficiary.[57] This same rule applies to minor repairs of a residence which is benefice property.[58] Major repairs to the residence are usually chargeable to a fund established to keep the benefice church in repair,[59] but may be a charge upon the benefice itself.[60] It is expressly directed that a bishop as administrator of his benefice shall keep an inventory of the movable property of that benefice and take care that such property shall pass safely and securely to his successor.[61]

The beneficiary has the use of a residence owned by his benefice.[62] He has the use also of certain movable property owned by his benefice,[63] and he has the right to expend for his maintenance the fruits or profits yielded by the benefice property.[64]

Thus the canons contemplate that three types of property may enter into the *bona* of a benefice: useful immovable property—a residence; useful movables—sacred vessels and vest-

[55] Can. 1415, § 2.

[56] Can. 1476, § 2.

[57] Can. 1477, § 1.

[58] Can. 1477, § 3.

[59] Can. 1477, § 2.

[60] Can. 1483, § 2.

[61] Can. 1483, § 3.

[62] Can. 1477, § 2; 1483, § 2.

[63] Can. 1483, § 3.

[64] Can. 1473.

ments and household furniture; and productive lands or securities held and managed so that they shall yield income.

From the nature of these properties and the purposes which the law makes them serve, together with the laws respecting their restoration, repair, conservation and transmission to successors, it is perfectly clear that they are to be held in fixed tenure, not expended for current purposes or sold and bought for profit. The obvious intent of the law is that the substance of such properties must be conserved, while the properties serve the beneficiary by their proper use, or yield to him fruits or profits.

The argument from analogy is this. The phrase of canon 1530, "*res ecclesiasticas immobiles aut mobiles quae servando servari possunt*", as construed in the preceding section, describes perfectly the *bona* of benefices. Yet that phrase is general, for it begins "*res ecclesiasticas*", which term describes the property of any church. Further, canon 1530 and its relative canons speak of "*Ecclesiae*" as owners of the property which those canons regulate,[65] and canon 1498 determines that "*Ecclesiae*" in a property context refers to all moral persons in the Church, so that canon 1530 governs not only the *bona* of benefices but the property of all churches. Canon 20 justifies an analogy from benefices to churches in general or from the property of benefices to the property of churches in general. Therefore canon 1530 governs any church property which has the characteristics of the *bona* of a benefice—church property bound to be conserved as to its substance, to be held in fixed tenure by the church which owns it, while its use and yield are devoted to the proper functioning of that church. This is the property which the canonists call "the fixed patrimony of a church".

[*This article concludes with Part II in the July quarterly of the current year.*]

[65] See can. 1530, § 2; 1531, § 3; 1533; 1534, §§ 1, 2.

THE HUNGARIAN LAW OF CRIMINAL PROCEDURE IN THE LIGHT OF THE MINDSZENTI TRIAL

IN dealing with the procedural aspects of the case against Cardinal Mindszenti, I, who attended this trial in the capacity of a counsel to one of the Cardinal's co-defendants, shall only deal with the Hungarian criminal procedure as it was effective at the time of the trial.

Cardinal Mindszenti was arrested on December 26, 1948, tried in February, 1949, and his case came on appeal before the National Council of People's Courts (N. O. T.) and was disposed of by the same at the beginning of July, 1949. Therefore, the presently effective, and to a great extent bolshevized, Code of Criminal Procedure,[1] which was introduced in 1954, did not apply then, and will not be dealt with now.

The communists prefer a slow and not at all abrupt abolition of existing institutions, and this attitude prevails in the satellite countries suffering under Russian tyranny.

The communists usually smuggle their own ideas and institutions into an existing system step by step, proceeding very slowly in a hardly noticeable way, in order not to arouse suspicion, resistance, or even public protest. The intrusion into fundamentals is often first noticed only after the whole structure has already collapsed. This happened to the whole Hungarian legal system, and criminal procedure was no exception.

Hungary was the military outpost of Europe for nearly a thousand years. During this millennium it happened more than once that she defended western Europe against the Asiatic aggression of Tartars [2] and Turks,[3] and paid the price

[1] Law No. V. of 1954.

[2] The Tartars invaded Hungary in 1241.

[3] Hungary was under Turkish occupation from 1526 until 1686, following the disastrous defeat of the Hungarians at Mohács in 1526. The capital city of Buda was liberated in 1686.

of being devastated. Besides this role of historical signficance, the Hungarians, in developing their national institutions, always endeavored to keep in step with their neighbors, and with Europe in general.

This pursuit naturally marked the development of the legal system, with that of the criminal law in general, and criminal procedure in particular. As a result of a long historical process, after experiments lasting for a cenutry, the modern Code of Criminal Procedure [4] was born. This Code was effective from 1896 until 1945, and supplied the rules of procedure for nearly fifty years with some amendments, rather minor, and irrelevent, which actually never touched principles. This classical Hungarian criminal procedure was based on a combination of the principles of accusation and investigation.[5] In fact, it preceded, and even surpassed, a great many of the modern criminal procedures of Europe. It was based on the principle of accusation, and, by taking the interests of the defendant, the freedom of a person, and that of the defense into consideration, adapted only as much from the principles of investigation as was necessary to the establishment of the true facts.

The purpose of criminal process was twofold within this system. First it was an instrument to uphold legal order (*Rechtsordnung*), that is, *to make substantive justice prevail*, and then, to protect the individual against the arbitrariness of the government, and against persecution, that is, *to protect the innocent*. To punish at any price was not an end of this system of criminal procedure, but only to punish the real offender, and him only to the limits of necessity dictated by justice, and to free the innocent from suspicion and inconvenience as speedily as possible.

This mixed system developed on French influence, and was based on both the accusatory and investigatory systems. It

[4] Law No. XXXIII. of 1896.

[5] Ferenc Finkey, *A magyar büntetöperjog tankönyve*, Budapest, Grill, 1916; Pál Angyal, *A magyar büntetöeljárásjog tankönyve*, Budapest, Atheneum, 1915-1917, 2 v.

recognized the defendant as a party to the process, and separated the functions of the judge, prosecutor, and counsel. Its basic principles were: open trial, oral procedure, the admission only of evidence presented during the trial (*Unmittelbarkeit*), free evaluation of evidence, freedom of defense, and last but not least, the arch-guarantee of any kind of justice: *equality before the law.*

How did the administration of criminal justice work under these principles?

First of all, everyone, prosecutor, defendant, and counsel alike, had the status of a party in the criminal process.

Proceedings were instituted upon *suspicion,*[6] but, in order to protect the innocent, the law distinguished between *grave suspicion,*[7] upon which judicial investigation might have been instituted, and *well founded suspicion,*[8] which must have been established in a judicial decision, and upon which criminal proceeding might have been instituted in a court of law.

A prosecutor was attached to every court, in order to secure the separation of prosecution and administration of justice.

It was the duty of the prosecutor to lead [9] the investigation. The purpose of investigation [10] was to discover and establish the facts necessary for the determination whether charges may or may not be brought. The investigation must have been made with the utmost forbearance, because the person under suspicion was after all a free citizen. The prosecutor as an officer of the court ordered the investigation *ex officio.*[11] It was the bounden duty of the prosecutor to collect all data whether for the prosecution or for the defense.[12]

[6] Finkey, *op. cit.,* p. 279.

[7] *Ibid.,* p. 280.

[8] *Ibid.,* p. 280.

[9] *Code of Criminal Procedure of 1896* (hereafter cited as *Bp.*) Sec. 84.

[10] *Bp.,* Sec. 83.

[11] *Bp.,* Sec. 93.

[12] *Bp.,* Sec. 100.

If the prosecutor found that the collected data warranted prosecution then he preferred charges, and this brought the investigation to an end, and commenced the judicial proceedings.

The law provided in almost every case a so-called *intermediate proceeding* (*közbenesö eljárás*).

The intermediate proceeding consisted of the following: Upon the particulars (*vádirat*) an inquiry was commenced in order to have the prosecutor's grave suspicion checked by a judicial authority. This judicial investigation was conducted by an investigating judge [13] (*vizsgálóbiró*), who acted under the supervision of a body of three judges, which eventually may be called in English: *senate of judicial investigation* (*vádtanács*). From the decision of an investigating judge appeal might be had to the senate of judicial investigation, which decided with final effect whether or not the case should be tried.

Naturally, during the investigation, and during the so-called intermediate proceeding, the principle of open trial prevailed only partially—that is, the proceeding was open only to the parties concerned. This was to serve the interest of the innocent in general, and that of the suspected person in particular. In other phases of the criminal proceedings the public might have been excluded only in a few exceptional cases, which was considered to be a safeguard against the misuse of judicial power.

Freedom of defense was one of the arch-guarantees of personal freedom. The defendant had the right to counsel, and this right could not be limited in any way whatsoever. This was not a privilege, this was a right.

The equality of parties materialized in the right of the defendant to collect and present evidence without any restriction. Naturally, the defendant had his handicaps against the prosecutor so far as every attacked person is handicapped against his aggressor in a certain way. The other handicap

[13] *Bp.*, Sec. 105.

of the defendant is his lack of professional knowledge in legal matters. This was to be eliminated by the cooperation of a professional counsel. Therefore, the defendant had the right to employ a counsel,[14] who in turn was entitled to act during the entire proceeding, therefore also during the investigation, to communicate with the defendant freely and without supervision, and to have access to the entire file of the case.

The counsel may make all kinds of motions during the entire proceeding,[15] including the phase of investigation, which in his opinion may serve the defendant. His duty is to protect the interest of the defendant, but he may not be instrumental in evasion of justice. The counsel, contrary to the duties of the prosecutor who was under the obligation to secure information and evidence not only for the prosecution but for the defense as well, may not act against the interest of the defendant. The counsel had rights of his own, and might have lodged, as a matter of fact may lodge even today, an appeal even against the will of the defendant. The counsel's role in the criminal process is best justified by one of the purposes of the process, namely, to clear the defendant, who is a party to the process, without his consent, from the charges as fast as possible.

Perhaps, granting the defendant the status of a party[16] was the most significant among the principles of Hungarian criminal procedure. Consequently, the defendant was not an object of the process but a party to it whose rights must have been protected under all circumstances, and could have been restricted even in the slightest only under the strictest formalities, and responsibility of a competent authority, and even then only for the shortest period of time.

The defendant must have been informed about the suspicions against him within reasonable time. Already at his first hearing he must have been advised of his right to choose

[14] *Bp.*, Sec. 54.

[15] *Bp.*, Sec. 62.

[16] Finkey, *op. cit.*, p. 235.

a counsel freely, and later every act of the proceeding must have been explained to him. He had the right to be present at every act of the proceeding, and to cooperate in taking evidence. He could not be compelled to make a statement.[17]

The position of the defendant was different from that of the prosecutor in that he had no authority to rule the case. Whereas the prosecutor could have ended a case by dropping his charges, the defendant could not have effected the same by making a confession, because such was not sufficient for a guilty verdict. The reason for this measure was the protection of justice. For admission could have been made by an innocent man as well as a guilty one. Accepting such as evidence, and basing a conviction upon it, could have resulted in miscarriage of justice.

Because this paper deals with the defendant's person in a criminal action, now I shall turn to the problem of the coërcive measures: preliminary arrest (*elözetes letartóztatás*), and investigative arrest (*vizsgálati fogság*), applicable against him.

As I have already mentioned, the limitation or suspension of defendant's rights could take place only exceptionally, and only under impelling circumstances. As a matter of rule, only judicial authority could order such a measure. Police authorities were vested with such a power only in very few instances, and always only in cases expressly provided for by law.[18] The upper limit of preliminary arrest was 15 days which could be extended by an additional 15 days in a single instance, and naturally appeal might have been had from such an order.[19]

Investigative arrest might have been ordered by a judicial authority.[20] The right of appeal was granted.[21] If the causes of the investigating arrest ceased, the detention must have

[17] *Bp.*, Sec. 135.

[18] *Bp.*, Sec. 141 and 148.

[19] *Bp., Sec.* 147.

[20] *Bp.*, Sec. 148.

[21] *Bp.*, Sec. 151.

been terminated regardless of the stage of the criminal process.[22]

With special consideration for the Mindszenti case, I have to mention at this point, among the coërcive measures, the house search. The issuance of a search warrant, and the execution of the search, was subject to strict conditions. In this case, as in criminal law in general, the relevant statutes could not be interpreted extensively. Only a judge was authorized to issue a search warrant, and it could be issued only against a person against whom the criminal action was commenced.[23]

After such preparations a case came to trial. Regularly, in a case before the district court, the court sat in a senate consisting of three judges.[24] Here the principles of open trial,[25] oral proceeding,[26] and evidence[27] fully asserted themselves. The court made its decision on the basis of free evaluation of the evidence presented at the trial.[28] Without evidence nobody could be found guilty.[29] The court considered only the act, and not the person of the defendant. Equality before the law was fully realized. The personal circumstances of the defendant were considered only as mitigating or aggravating circumstances when imposing punishment.

The court was under the obligation to state in the sentence why the defendant was found guilty or not guilty.[30] It was also stated which evidence was accepted and which rejected, and finally, which circumstances were taken into consideration in imposing the punishment.

[22] *Bp.*, Sec. 157.

[23] *Bp.*, Sec. 173.

[24] Law No. VII. of 1912, Sec. 3.

[25] *Bp.*, Sec. 293.

[26] Finkey, *op. cit.*, p. 113.

[27] *Bp.*, Sec. 306 ff.

[28] *Bp.*, Sec. 324.

[29] *Bp.*, Sec. 326 (2).

[30] *Bp.*, Sec. 328.

Defendant, counsel, even against the will of the defendant,[31] and the prosecutor as well had the right of appeal.

The court of appeals sat in a senate consisting of three judges of that court. From there the case could be brought for revision to the Curia, the supreme court of the country, which acted in a senate consisting of five justices.[32] Once a case was before the court this could act *ex officio* in ordering the taking of new evidence, because the purpose of the process was to discover the truth.[33]

In order to protect the defendant against the infringement of his rights, and from abuse, only the presiding judge was permitted to question, interrogate, and discipline him.[34] The judges and justices, and the prosecutor, could communicate with the defendant only through the presiding judge or justice, respectively.

In order to appreciate fully the provisions, and penetrate the ideas of the classical Hungarian criminal procedure, it has to be pointed out that since 1869,[35] that is, preceding the enactment of the Code of Criminal Procedure by twenty years, a statute already provided for the independence of the judges. Under this statute, if a judge was once appointed he never could be removed or transferred without his consent, unless he was found guilty in a criminal or disciplinary action. Neither a government agency nor anyone else had the right to influence a judge in dispensing his judicial duties.

For nearly half a century these legal principles ruled the Hungarian administration of criminal justice, and assured its good order and stability.

In 1945 the Russians occupied Hungary. They did not consider the order, and within it the legal order, of the country as it developed through ten centuries adequate to the realiza-

[31] *Bp.*, Sec. 383.

[32] Law No. VII. of 1912, Sec. 14.

[33] *Bp.*, Sec. 260 ff.

[34] *Bp.*, Sec. 304.

[35] Law No. IV. of 1869.

tion of their goals, and commenced a development which finally led to the horrible oppression of today. The members of the bench, with very few exceptions, were men of impeccable character and outstanding legal ability, and lived far removed from daily politics. Naturally, these judges could not be trusted by the communists returning from Moscow, and by the horde of their newly acquired followers. It could not be expected that judges brought up on the ideals of humanism and rule of law will be willing tools in the hands of the communists for sending on communist orders people, branded as war criminals, to the gallows or to long term imprisonment.

The country was not yet occupied in its entirety by the Russians when Decree No. 81/1945 *M. E.* was issued.[36] This decree stated in its preamble that its purpose is to "punish those who were causing or participated in the historical tragedy of the Hungarian people as fast as possible."

The method of accomplishing this goal was twofold. On the one hand, the great majority of the cases was removed from the courts of competent jurisdiction, and, on the other, the principle of *nullum crimen sine lege*[37] was ignored in the enactment of the new substantive provisions of criminal law.

However, this paper will be confined to procedural problems only.

The new rules of criminal procedure were made according to entirely different principles. The prime endeavor of the old criminal procedure was to free the innocent from undue or arbitrary prosecution. The principle upon which the new procedure rests is that not the logical chain of evidence and the weighed opinion of the judge is relevant but only making sure that the suspect does not escape punishment, whether proven guilty or not.

Whereas the classical Hungarian criminal procedure con-

[36] Decree 81/1945 M.E. which was later incorporated into Law No. VII. of 1945 (Law on the People's court).

[37] Law No. VII. of 1945, Sec. 1.

sidered two appellate instances a basic guarantee of the elimination of judicial errors, postwar legislation was satisfied with a single appellate instance.

This new decree commenced the demolition of the guarantees built into the Code of Criminal Procedure. First step in this pursuit was the transfer of all of the rights and duties of the investigating judge to the people's prosecutor,[38] who was authorized to order preliminary arrest, from which no appeal might be had.[39] The maximum duration of investigating arrest was extended to 30 days with a possibility of another 30 days extension.[40] The decisive point is perhaps that no appeal may be had from such a decision of the prosecutor. A prosecutorial mistake or misjudgment may deprive the defendant of the advantage of defending himself while free. In this the new statue deviates even from its own system under which in general at least one appeal may be had in most cases.

The intermediate procedure, that is, the judicial investigation, was denied,[41] as well as the application of Section 92 of the Criminal Code,[42] the latter providing that even in the presence of the most weighty mitigating circumstances the judge was only authorized to reach for the minimum of the same kind of punishment but not to cross the limits into another kind.

To be specific, in Hungary deprivation of liberty was executed in three different kinds of institutions under three different sets of rules. These were: penitentiary with forced labor, penitentiary, and jail.[43] Section 92 of the Criminal Code granted the authority to the court that in the presence of weighty mitigating circumstances it might impose a punish-

[38] *Op. cit.*, Sec. 30.

[39] *Op. cit.*, Sec. 33.

[40] *Op. cit.*, Sec. 33.

[41] *Op. cit.*, Sec. 35.

[42] Law No. V. of 1875, Criminal Code.

[43] Law No. V. of 1875, Sec. 20.

ment of a lower order than prescribed by statute for the specific criminal act. Accordingly the court could impose penitentiary with forced labor instead of the prescribed capital punishment, penitentiary instead of penitentiary with forced labor, and so on.

The cases against war criminals were assigned to the jurisdiction of the "people's court," specially created for this purpose.[44] This court was composed of a representative of each of the then recently organized five political parties,[45] and one professional judge, that is, a person who passed the bar examination.[46] The latter presided at the trial but had no vote.[47]

The goal of the trial is to punish the defendant.[48] The prosecutor has no right to appeal for mitigation or acquittal, no matter how firmly he is convinced that an innocent man has been punished. He was permitted only to appeal against the acquittal of the defendant, or for the aggravation of the punishment.[49]

The defendant had the right to appeal only in cases when he was sentenced to death, imprisonment exceeding three years, fine exceeding 20,000 *Pengös*, confiscation of property, or loss of job.[50] Independent right to appeal was denied to the defense counsel.[51] On appeals the National Council of People's Courts decided in closed session with finality.[52] This body consisted, similarly to the people's courts, of delegates of the political parties; however, its members were required to have legal qualifications prescribed for judges.[53]

[44] Law No. VII. of 1945, Sec. 20.

[45] *Op. cit.*, Sec. 39.

[46] *Op. cit.*, Sec. 42.

[47] *Op. cit.*, Sec. 49.

[48] Preamble of the Law, *op. cit.*

[49] *Op. cit.*, Sec. 53.

[50] *Op. cit.*, Sec. 53.

[51] *Op. cit.*, Sec. 53.

[52] *Op. cit.*, Sec. 56.

[53] *Op. cit.*, Sec. 57.

The principles of open trial, oral proceeding, and taking evidence presented only at the trial do not prevail any more in the appellate phase of the case. The judges, party-appointed, though professional, decide in closed session.

An amending decree in 1945 deprived the Minister of Justice of his right to suspend the execution of a sentence, transferring it instead to the people's court, and provided that the execution of a sentence may be suspended only if a new trial was ordered simultaneously.[54]

The humanitarian principle applying to the duration of the investigating arrest had also been dropped and such arrest could be extended indefinitely.[55] The right of the defendant to appeal had been considerably narrowed by the limitation that appeal might be had only in cases in which he was sentenced to death or imprisonment exceeding five years.[56]

After all these, the abolition of the investigating senate (*vádtanács*) in 1946 [57] was only a sign of the approaching fact that the old Code of Criminal Procedure was struggling through its last days, and the administration of people's justice would extend to all criminal cases.

From this time on people did wisely if they realized and accustomed themselves to the fact that statutes were not made after proper deliberation by experts but were issued haphazardly under the slogan that they will be amended and corrected in the course of time.

In 1947 the criminal procedure was amended again. Under the provisions of law No. XXXIV of 1947 the people's court was authorized to apply Section 92 of the old Criminal Code on maximum mitigation again; [58] appeal may be had from the prosecutor's order of preliminary arrest to the people's

[54] Decree No. 1440/1945 M.E., Sec. 4.

[55] *Op. cit.*, Sec. 17.

[56] *Op. cit.*, Sec. 21.

[57] Law No. XIV. of 1946, Sec. 1.

[58] Law No. XXXIV. of 1947, Sec. 2.

court; [59] and the form of appeal against a sentence was regulated anew. The remedy, under the name: petition for revision (*semmisségi panasz*), was from a sentence only against violation of law, and facts, no matter how wrongly they were established, may not be reviewed. This statue did not differentiate between the rights of appeal of the prosecutor, defendant, and counsel.[60]

If we scrutinize the new provisions, we shall find that the independent and professional judge of the old style had been replaced by a lay judge appointed by a political party, dutifully following the party line. Preliminary arrest, now including also the investigating arrest, lost its old character of an exceptional coercive measure ordered by a judicial authority, and became a procedural act imposed by the prosecutor. Its maximum duration was also extended.

The intermediate procedure—which was a strong safeguard against arbitrariness, and even against mistakes—was abolished. The charges brought by the prosecutor are sufficient cause for a trial before a court. Equality of parties was also abolished by giving to one of the parties, the prosecutor, authority over another party, the defendant.

Furthermore, the new rules of criminal procedure introduced a distinction between the prosecutor and the defendant by giving to the former on the one hand a much wider, and on the other, to the latter a much more limited right to appeal. Counsel was deprived of his status as a party by the abolition of his independent right to appeal.

The law on Protection of the Democratic State Order and the Republic by means of Criminal Law was the law under which Cardinal Mindszenti was tried.[61] This contains mostly substantive provisions with which I shall deal only as far as it is relevant to the Cardinal's case. This law established a

[59] *Op. cit.*, Sec. 15.

[60] *Op. cit.*, Sec. 19.

[61] Law No. VII. of 1946.

new type of court: the Special Bench of the People's Court.[62] It is composed somewhat differently from the people's court organized in 1945. Whereas the latter consisted of six judges, the former has only five. The representative of the by then abolished Democratic Civic Party was missing. This Special Bench of the People's Court consisted of the lay representatives of the Independent Smallholders Party, the Communist Party, the Social Democratic Party, the National Peasant Party, and a single professional judge who was appointed by the President of the People's Court. The presiding judge of the Special Bench, contrary to his counterpart at the regular bench of the people's court, had a vote besides his privileges arising from his chairmanship.

Appeal from the sentence of the Special Bench may be had to the National Council of People's Courts.

The provisions just described constituted the effective law at the time when the communist leaders decided after a long but unsuccessful struggle of the bolshevic government against the Church that Cardinal Mindszenti, the leader of the Roman Catholic Church in Hungary, must be removed from their way.

In November 1948, Father András Zakar, personal secretary to the Cardinal, was arrested. On December 23, 1948, the Secret Police searched the palace in Esztergom, the ancient residence of the Prince Primates. For this act Father Zakár was brought to the palace by the Secret Police.

Under the then effective law a search warrant was permitted to be issued only for the search of a defendant's residence. It was also mandatory under law, as I have already mentioned, that if a person was suspected of having committed a crime, he must have been informed of such a suspicion within reasonable time. The series of illegalities in the Cardinal's case was commenced with the issuance of this search warrant.

Up to that date the Cardinal was not informed about having been a suspect in a criminal investigation, and even less about

[62] *Op. cit.*, Sec. 11.

being a defendant in a criminal action. Therefore, a search warrant could not be issued against him legally. The issuance of the search warrant was obviously an illegal act. The search was also carried out illegally, because under the law the Cardinal should have been duly informed in writing about the issuance of the search wararnt in order to give him opportunity to appeal. Needless to say, this never happened.

I have to refute the repeated communist allegation that the search was ordered against Father Zakár, who, being the secretary of the Cardinal, also resided in the palace, and that, therefore, as the communists contend, this made the issuance of the search warrant legal. This might have been correct concerning the premises actually occupied in the palace by Father Zakár, but the file room of the archdiocese, located in the basement of the palace, certainly could not be considered Father Zakár's apartment. The point is that the Cardinal was convicted on the merit of the documents seized during this illegal search.

The overwhelming majority of the population was profoundly disturbed by the press campaign against the Cardinal and the Secret Police did not venture to crown its activities by laying hands on the Prince Primate on the great holiday of the Redeemer's birth. They had to wait. The Cardinal was still able to deliver his sermon on Christmas day.

The Cardinal was arrested on December 26, 1948, on suspicion of treason, acts aimed at the overthrow of the Republic, espionage, and violations coming under the foreign exchange regulations.

It has already been pointed out that according to law the preliminary arrest and the investigatory arrest were coercive measures to be executed with the greatest forbearance. The place of this great forbearance was the second floor premises of 60 Andrássy Avenue, the notorious citadel of the State Secret Police. There the Cardinal was kept incommunicado, without the assistance of a lawyer or of one of his relatives.

Under the law the Cardinal should have been advised im-

mediately after his arrest that he had the right to the assistance of a counsel during the entire proceedings against him, that is, also during the investigation. This never happened.

Afterwards the Secret Police arrested nearly twenty men. The prosecution, for never disclosed reasons, divided the defendants into two groups. The great case had seven defendants.

A few days before he went on trial, the Cardinal had been advised that he might exercise his right to choose a counsel. Then the Cardinal was informed that he could not count on the services of Dr. Joseph Groh, his personal friend and permanent legal adviser, because he was also under arrest for one of his speeches he made in a committee of the Parliment in his capacity as a member of this august body. Whereupon the Cardinal asked for the list of lawyers. Instead of what he asked for, the Cardinal was given a sheet of paper with a single name. It is true, this name was written on the paper a hundred times, but it was only one name, that of Dr. Kálmán Kiczkó.

Dr. Kiczkó was a protestant lawyer, who during the communist regime of Béla Kun in 1919, without having been a member of the judiciary, became a district judge, and who spent the thirty years after this happened trying to make his shameful activities forgotten.

This counsel, " freely chosen " in this rather peculiar manner, failed to file a brief against the information of the prosecutor, although this would have been his duty under law.

The co-defendants of the Cardinal, except for Father Zakár, exercised their constitutional right of choosing their own counsel. Father Zakár's counsel was appointed by the Bar Association in the person of a communist functionary of the same. For five of the defendants counsel were secured by their families. Each counsel who was freely chosen, having learned by the case of Dr. Groh, immediately appointed a co-counsel for the event that one of them might be arrested during the trial, which appeared to be wholly probable.

The defendants, who were arrested at different times, could not communicate with their counsel until February 2, the date of their transfer to the court's jail, that is, three days preceding the trial.

The charges against the Cardinal, literally conforming with the first report issued by the police, were: treason, acts aimed at the overthrow of the Republic, espionage, and acts coming under the foreign exchange regulations.

As has been repeatedly stated, this paper is to deal only with the procedural aspects of the case. But it has to be pointed out that under Law No. VII of 1946 the Special Bench of the People's Court had original jurisdiction over actions involving treason, acts aimed at the overthrow of the Republic, and espionage. But the trial for foreign exchange offenses by this Special Bench removed the case from the court of competent jurisdiction. An answer that the removal was justified by the consolidation of the causes is wholly unacceptable, because consolidation does not justify the removal of a case from *one special* jurisdiction to another, nor does the statute provide for such. So began the trial of Cardinal Mindszenti.

Nothing has to be said about Vilmos Olti, the erstwhile Fascist, who presided over the trial, nor about Gyula Alapy, the prosecutor, an infamous alumnus of the famous Benedictine school of Gyor.

The carefully selected audience and counsel were already in their seats when through a side door, between two guards, in a simple black suit with a black *collare* the Cardinal entered with slow and tired paces.

The counsel rose in silence. The two communists among them, the counsel of the Cardinal and of Father Zakár, could not avoid joining the others in this homage. The counsel's example was followed by a portion of the audience. Those who did not rise among them were evidently agents of the Secret Police interspersed in the audience.

What has become of the Cardinal in five weeks? He has a strange, new look in his eyes, not apparent heretofore. Whom

we see is an old man, although his age is only 57 years. He takes his place without moving his lips. The co-defendants enter one after another between their guards. Each of them is greeting the Cardinal with a deep bow. The head of the Hungarian Church reciprocates each greeting with a slight gesture. It may be sensed from his movements that something happened to the prelate, hitherto of an erect figure with apparent spiritual powers. First of all the look in his eyes. Stony and strange.

Shortly thereafter the court enters, led by Vilmos Olti. He calls the defendants to the bar, and addresses the Cardinal simply as "Mindszenti," to which he adheres throughout the trial.

The Cardinal's voice is just as the look in his eyes, tired and broken. Where is the timbre of the great orator's voice? He is instantly advised by Olti to speak up loudly, but permission is granted to him to remain seated during the trial. Olti repeatedly inquires with a faked courtesy whether the Cardinal feels tired or wishes a recess.

At the trial all defendants confessed their own guilt as well also as that of their co-defendants, as far as this was possible.

The prosecution did not even make an attempt to put the authors of the letters seized at the palace of the Cardinal on the witness stand to identify these documents as required by law.

The prosecution did not offer additional evidence, and after the defendants had confessed in full, the offering of evidence on the part of the defense would have been senseless.

Dr. Kálmán Kiczkó, the counsel of the Cardinal, did not find it necessary to examine on the stand either the Cardinal or any of his co-defendants. He considered the admission of the facts by the Cardinal the admission of his guilt; thereby he himself admitted the guilt of his client in his *pledoyer*. Later he presented the Cardinal's admission as a mitigating circumstance.

The court did not order the taking of any kind of evidence *ex officio* although this would have been within its power, and even duty under law.

The outcome of the case to suit the political requirements was predetermined by the special composition of the bench, and the person of the judge appointed to speak for it.

Had this Communist court dared to sentence the Cardinal to death, it would have done so. He represented to them the greatest enemy of the regime. But even this handpicked court and its Moscow bosses would not dare the anger of the people and the eventual international consequences by imposing capital punishment; so they sentenced him to the maximum that they dared.

The Cardinal and his co-defendants were found guilty on all counts. The sentence was based solely on the admission of the defendants. This already was in conflict with the pertinent Hungarian laws which provided, as has already been mentioned, that the defendant was a party to the proceedings, and not a witness whose testimony could be admitted in evidence, and his conviction based upon that testimony. No other, or more precisely, no evidence was introduced. The court explained at considerable length that it had judicial knowledge of the Cardinal's activities and practises; nevertheless it failed to state why these activities constituted punishable acts.

The Cardinal's defense counsel, when lodging his appeal, failed to reserve exceptions against these violations of law, as well as against the court's decision by which only mitigation under Section 91 of the Criminal Code was allowed. Imposing the punishment the court refused to apply Section 92 of the Criminal Code, under which a more extensive mitigation would have been permissible, but gave no reasons for its decision, yet counsel failed again to appeal on the ground of the failure to explain the sentence.

The National Council of People's Courts approved the life sentence of the Cardinal on July 6, 1949.

Finally, I wish to point out that the Cardinal's life sentence was not commuted nor was he pardoned. What happened was that the place of his confinement was changed from an ordinary prison to a former monastery where he was kept under guard and rules which we may consider as the rules of house arrest.

It is well known that since the Hungarian revolt was crushed the Cardinal has enjoyed the hospitality of the United States legation in Budapest within extraterritorial premises.[63] If he should leave his refuge, the communist government could under the effective laws send him back to prison for life without any further proceeding.

Leslie L. Nemes, L.L.D.

Washington, D. C.

[63] Since November 4, 1957.

CONSIDERATIONS ON THE FUNCTION OF THE DEFENDER OF THE BOND *

UNDOUBTEDLY one of the greatest contributions of Pope Benedict XIV to the science of Canon Law in general and to the matrimonial trial in particular is the institution of the office of *Martimoniorum Defensor*—or as he is now called, the Defender of the Bond—by the Constitution *Dei miseratione* of November 3, 1741. It is indeed, as Reverend John Leo Dolan states in his excellent dissertation on the *Defensor Vinculi,* "a most fitting monument to a Pope who was also a great canonist".[1] The wisdom and foresight of Benedict XIV in establishing this office are evinced from the fact that it has come down to us practically unchanged over a period of some two hundred years; and, as delineated in the Instruction *Provida* of the Sacred Congregation of the Sacraments of August 15, 1936, it can be truly said to constitute the very heart of the matrimonial trial

It is true that the judges play the principal part in the matrimonial process, directing the trial in all its stages, ruling on the various petitions, admitting and hearing witnesses, weighing the evidence submitted, and issuing the sentence which affirms or rejects the contention of the parties. And it would be entirely false to compare the judge to a sort of electronic computer which is fed various data and information and then comes up with an automatic reply of "*Constat*" or "*Non constat*" to the question proposed to it. The role of the judge in moderating the whole course of the process is too demanding and exacting to remain a merely passive or receptive one. But it is nonetheless true that, if the Defender of the Bond is not diligent in carrying out the various func-

* Paper read at the Eastern Regional Conference of The Canon Law Society of America held in New York City, at its Spring meeting, 1957, by the Reverend Alfred R. Julien, J.C.D.

[1] *The Denfensor Vinculi,* C.U. Canon Law Studies, No. 85 (Washington, 1934), p. 125.

tions of his office, the whole matrimonial process will suffer as a result. It may even become a one-sided affair in which the parties, through fraud or collusion, attempt to shake off an undesirable yoke, while no one strives to uphold the sanctity and the permanence of the marriage bond, and it could happen that the very ends of truth and justice are defeated by that which was intended as a means to make them clear and to achieve them.

Some, unfortunately, in their high estem for the office of the Defender of the Bond, have gone to extremes and have adopted what is commonly referred to as a "Defender of the Bond mentality". They maintain that the Defender of the Bond must strive at all cost to bring up in the course of the trial anything, no matter how trivial and unimportant, which could be construed even remotely as an argument in favor of the bond. According to them, the position of the Defender of the Bond in the matrimonial process is similar to that of the prosecuting attorney in a criminal trial before the civil court, and he should leave no stone unturned to convince the judges that the nullity has not been established or that the bond should continue.

This erroneous opinion may claim to find some justification in the letter of the Sacred Congregation of the Sacraments of January 5, 1937. This letter brought to the attention of the Ordinaries that not a few of the Defenders of the Bond appointed in cases of non-consummation had failed to discharge their office properly in that they presumed to write not in favor of the consummation of the marriage, but positively in favor of the truth—an attitude that the Congregation considered as "so far removed from the provisions of the law that there is no room for dispute about it". The Congregation then told the Ordinaries to instruct the Defenders of the Bond that "it is their right and duty to bring up in the trial all that they deem necessary or useful in defense of the marriage, and, at the close of the trial, to draw up carefully observations in favor of the consummation of the marriage, drawn from the record, either as regards matters of procedure

or of substantive law, without giving their opinion on the merits of the case. For they must understand that it pertains only to the Bishops and to no one else to express their opinion on the truth of the matter, until all the proceedings are sent to this Sacred Congregation for a definite judgment".[2]

The representations made by the Sacred Congregation were undoubtedly founded and the recommendation it made to correct the situation was quite proper; but the letter was so strongly worded that it could have left the hasty reader with the impression that it is the duty of the Defender of the Bond to argue at times artificially and against his own convictions in favor of consummation. Such an attitude loses sight completely of the real function of the Defender of the Bond which can be understood rightly only in the light of the purpose of the matrimonial process as a whole. While it is true that the Defender of the Bond, as his name indicates, must intervene in matrimonial trials to defend and protect in a special way the sacred bond of marriage, he nevertheless remains only one of the officials of the court, and his function is subordinated to the purpose of the trial itself, which is to attain to objective truth with regard to the matter in controversy.

This has been brought out most clearly and eloquently by Pope Pius XII in his allocution to the Auditors of the Sacred Roman Rota on October 2, 1944. Because of the importance of this pronouncement of our Holy Father, and because of the implications it contains concerning the function of the Defender of the Bond, you will, I am sure, bear with me if I quote extensively from this address the sections which pertain to the Defender of the Bond.

After pointing out that the sole purpose and end in the matrimonial process is a judgment in accordance with truth and law, either concerning the alleged nonexistence of the conjugal bond in the process of nullity, or the existence or nonexistence of the conditions necessary for the dissolution of the bond in the informative process "*de vinculo solvendo*",

[2] The English translation of this letter may be found in Bouscaren, *The Canon Law Digest,* Vol. II, pp. 541-542.

His Holiness examines carefully the contribution of each official of the court toward the achievement of this single purpose. Coming to the role of the Defender of the Bond, he states:

"It is the competency of the Defender of the Bond to uphold the existence or the continuance of the marriage bond. This, however, is not to be effected in an absolute way but subordinately to the purpose of the process which is the search and the ascertainment of the objective truth.

" The Defender of the Bond must co-operate toward the common end in so far as he investigates, presents and clarifies all that can be adduced in favor of the bond. To enable the Defender of the Bond, who is to be considered as '*pars necessaria ad iudicii validitatem et intergritaten*', efficaciously to fulfill the duties of his office, procedural law has given him special rights and has assigned to him definite duties. And just as it would not be compatible with the importance of his office and with the vigilant and faithful fulfillment of his duty if he were to be content with a summary scrutiny of the acts and certain superficial observations; so it is likewise not proper that this office be entrusted to those lacking in experience and mature judgment. The fact that the observations of the Defender of the Bond are subject to scrutiny by the judges does not exempt from this rule, for the judges should find in the careful work of the Defender of the Bond an aid and complement to their own activity. Nor is it to be expected that the judges always repeat all the work and all the investigations of the Defender in order that they might be enabled to place trust in his exposition of the case.

" On the other hand, it cannot be demanded of the Defender of the Bond that he draw up a defense at any cost—an artificial defense without care as to whether or not his statements have a solid foundation. Such a demand would be contrary to right reason. It would burden the Defender of the Bond with a useless, worthless task. It would contribute no clarification, but rather a confusion of the question. It would harmfully prolong the process. In the very interest of truth

and by the dignity of his office the Defender of the Bond must, therefore, be accorded the right to declare, whenever the case requires, that after a diligent, thorough and conscientious examination of the acts he has discovered no reasonable objection to be made against the petition of the plaintiff or the petitioner.

" This fact and this knowledge of not having unconditionally to defend an imposed thesis, but of being instead at the service of the already existing truth, will spare the Defender of the Bond from proposing questions which would be one-sidedly suggestive or tricky. It will further spare him from exaggeration and from changing possibilities to probabilities, or even to accomplished facts. This will likewise spare him from asserting or fabricating contradictions in cases where a sound judgment would not discern them or would easily resolve them.

"It will spare him from impugning the veracity of the witnesses, because of discrepancies or inaccuracies on points not essential or without importance to the object of the process, and which are proved by the psychology of the deposition of the witnesses to be within the sphere of the normal causes of error, but not detracting from the value of the substance of the deposition itself. Finally the realization of his having to serve truth will restrain the Defender of the Bond from demanding new proofs when those already adduced are fully sufficient to establish the truth. . . . . .

" Nor should it be objected that the Defender of the Bond must write his observations not '*pro rei veritate*' but '*pro validitate matrimonii*'. If by this is meant that the Defender of the Bond must emphasize all that favors and not that which is opposed to the existence or the continuance of the bond, the observation is indeed accurate. But if, instead, is intended the affirmation that the activity of the Defender of the Bond is not likewise bound to serve the ultimate purpose, namely the ascertainment of the objective truth, but that he must unconditionally and independently of the proofs and results of the process sustain the imposed thesis of the existence

or necessary continuance of the bond, then this assertion must be adjudged as false. Thus all those who participate in the process must without exception direct their efforts toward the one end: '*pro rei veritate*!'"[3]

While these remarks of the Pope touch upon various phases of the activity of the Defender of the Bond, they understandably are more explicit with regard to the written animadversions to be submitted by him at the end of the process. It might be well to note that the Pope does not make any distinction between formal and informal cases. Of course, by the very nature of the summary process, it could often happen that the Defender of the Bond would have no reasonable objection to a declaration of nullity. But the fact that the Pope is here addressing the Auditors of the Rota, where the large majority of the cases tried are formal cases, would seem to indicate that the Defender of the Bond has the same right in this type of case to declare that he has no valid arguments to propose against the claim of the plaintiff. Hence, even in a formal process, when the case is clear and conclusive, the Defender of the Bond would not be acting correctly if he insisted officiously in presenting an artificial defense of the marriage based on irrelevant minutiae or mere suppositions and figments of the imagination. Repetition of the same mistake on his part would gradually instill in the minds of the judges the notion that the remarks of the Defender of the Bond are not worthy of consideration, and they may be led to neglect them altogether even when, at times, they might contain serious and well founded arguments in favor of validity.

Many of the duties and rights of the Defender of the Bond as outlined in Articles 70 and 71 of the Instruction *Provida*; but perhaps the most important part that he plays in the matrimonial process is that pertaining to the questions to be proposed to the parties and the witnesses in their judicial examination. It is the duty of the Defender of the Bond to draw up these questions beforehand and to present them to

[3] The complete text of this important allocution of Pope Pius XII may be found in Bouscaren, *The Canon Law Digest,* Vol. III, pp. 612-622.

the judge in a sealed envelope. The judge may not dispense with this requirement, nor is he free to disregard the questions drawn up by the Defender of the Bond and conduct the examination as he sees fit. Of course, he is allowed to ask questions *ex officio*, but these should be asked not in the place of the questions of the Defender of the Bond, but merely to supplement them when he judges it necessary or useful to do so. It is, then, most important that the Defender of the Bond attend to this particular phase of his function with the utmost diligence. If he is negligent or remiss, much information having a substantial bearing on the case will not be disclosed.

The interrogatories for the examination of the parties and witnesses are divided into two parts: the general questions and the particular questions. The general questions have as their purpose to ascertain general information concerning the person deposing or testifying: name and address, place and date of birth, parentage, religion, occupation, and relationship with the parties in the case. Although Article 99, § 2, does not mention it, it is well to ask also in this general examination that the party or witness exhibit to the judge a document of identity and note that this has been done should be made by the notary. Article 97 provides that no one should be admitted to testify who has not proved his identity and supposes that this will have been done before the actual questioning. But a question pertaining to identity in the general interrogatory will serve as a remainder to the judge who might otherwise inadvertently fail to secure proper identification. Again, Article 99 contains only a general reference to the religion of the witness, but there is nothing to forbid inserting a question inquiring whether he or she practices her religion faithfully. The reply to such a question can at times be very helpful in determining the credibility of the witness.

The general interrogatory is the same for all persons being examined, and hence it could for the sake of convenience be printed or mimeographed on one page, for use in nearly all trials. However, this is not true of the particular questions,

which are very difficult to prepare and require conscientious study on the part of the Defender of the Bond. To draw up these questions effectively, the Defender must be well versed in Canon Law and must be conversant with all the details of the specific case before him. While the information which he seeks to discover by the questions is generally the same in certain types of cases, e.g., where a defect of consent is alleged because of the exclusion of one or the other of the *bona matrimonii*; still the manner in which he will obtain this information varies in each individual case, according to the background of the witness, his relationship to the parties, and the source of his knowledge. Stereotyped questions used for one and all witnesses without discrimination not only indicate a lack of proper interest of the Defender of the Bond in his work, but may often fail to elicit all the information which a particular witness could offer, with resulting failure to attain the truth in the matter under consideration. Furthermore, such sterotyped questions can at times cast aspersions in the mind of the witness on the dignity and intelligence of the court, by appearing absurd or at least superfluous. When, for example, a witness has just stated that she is the mother of the plaintiff, it seems ridiculous to ask her in the very next breath: "What is the basis of your acquaintance with the plaintiff?"

In preparing the questions, the Defender of the Bond must take into consideration the articles or points submitted by the parties or their attorneys. If these are not drawn up specifically in the form of questions or statements to be verified or rejected by the witness, they can be gathered from the general statement of the case made by the plaintiff when he presents the *libellus*. At any rate, it is always recommended that the plaintiff, when he submits his list of witnesses, be made to indicate just to what facts the witness will testify. This will help not only to eliminate many useless witnesses, but also will prove very useful to the Defender of the Bond to prepare an interrogatory adapted to each individual witness.

In making use of the questions or points prepared by the parties or their attorneys, the Defender of the Bond may

modify them especially if they are leading, and even eliminate some of them as not pertinent or superfluous. Here particularly the Defender must keep in mind that, although it is his special duty to defend the bond of marriage, he likewise has a very positive duty to contribute to the attainment of the truth. He may not disregard altogether the articles submitted by the parties, even though, if confirmed by the witnesses, they would tend to establish the nullity of the marriage. Canon Law charges him with preparing the interrogatory on the case as a whole, and not merely with regard to the validity of the marriage. Article 70, § 2, is very explicit on this point: it gives the Defender of the Bond the right to recast the questions proposed by the attorneys but in such a way that he shall supress nothing that is necessary or opportune for the ascertainment of the entire truth in the case.

It is to be noted that if the Promoter of Justice impugns the validity of the marriage, the Defender of the Bond may not change the questions which he submits (Art. 71, § 2), but nothing forbids him from incorporating these questions in his own interrogatory. It is not necessary that the questions of the Promoter of Justice be proposed first and only after that those of the Defender of the Bond. Such a procedure would oftentimes mean useless duplication of effort and unduly prolong the examination of the witness.

In preparing his interrogatory, the Defender should begin with questions which are more general in character, questions that will give the witness the opportunity of speaking freely and fully about the case and volunteering, as it were, the information that he possesses. Only after this should questions be inserted that will bring out particular facts or details that have been omitted in the replies to the previous questions.

Questions that would elicit a mere "yes" or "no" answer are to be avoided as much as possible. Great care must be taken also to avoid suggestive or leading questions. The questions must never be formulated in such a way that the witness will be able to deduce from them what precise information is being sought, or what reply will favor the plain-

tiff's petition. If the questions are too pointed and specific, it could also happen that, through a false sense of reverence or through a subconscious fear of offending the judge, the witness will admit to knowledge which actually he does not possess. Thus it would be wrong for the Defender of the Bond in a case of exclusion of the *bonum prolis* to inquire of the party: "Did you intend to exclude the right to conjugal intercourse, or merely the exercise of this right?" The average layman is generally unaware of this distinction and even in restricting his consent does not advert to the right and the use of a right as the canonist would. It is for the judges to determine from the depositions of parties and witnesses and from all the circumstances of the case whether the right was actually excluded or not. Similarly, in cases involving the *bonum sacramenti,* it would be unwise and imprudent to ask the party: "When you contracted marriage, did you reserve to yourself the right to seek a divorce and to remarry in the event that your marriage proved to be unhappy?" Such a party would immediately suspect that an affirmative answer is expected, and might be tempted to give such an answer to favor his cause, even if it were not the truth.

Questions for witnesses must be cautiously formulated also to bring out knowledge of facts and not mere impressions or opinions. Questions like the following are entirely out of place: "What would be your impression," or "Do you feel that he did not intend a permanent marriage," or again "Would you say that he intended a real marriage and that he actually transferred martial rights but that he intended to abuse these rights?"

The question, however, pertaining to the source, time and manner of the witness' information and knowledge should be very specific, and the judge and the Defender of the Bond should not be satisfied with only general replies to these questions. In fact, questions of this type should be repeated and a definite answer insisted upon for every incident witnessed or for every statement heard. At times judges are hopelessly confused by reading through depositions in which all kinds

of facts are stated or assertions attributed to the parties, but with practically no indication as to the time when knowledge about these was acquired or when they actually took place. Even when it is asserted that the events occurred before or after the marriage, the definite time before or after the marriage should be specified. The circumstances in which a certain statement was made can help much at times to pinpoint the precise time at which it was uttered, and hence questions pertaining to the circumstances or the occasion of a particular statement are very important. But even here the Defender must guard against leading questions. If the parties separated on August 14, 1953, the Defender should not word his question: "Did he say this to you before August 14, 1953, or only after that date?"

All the questions we have given by way of example are deficient not only because they are suggestive of the answer to be given, but also because they fail in some of the other requirements set down in Article 102, which reproduces verbatim Canon 1775: "*Interrogationes breves sunto, non plura simul complectentes* (hence disjunctive or multiple choice questions are to be avoided), *non captiosae, non subdolae, non suggerentes responsionem, remotae a cuiusvis offensione et pertinentes ad causam quae agitur.*" Never should there be any attempt to confuse or badger the witnesses, as is sometimes done in civil courts. The Defender of the Bond may feel at times that he would like to introduce some irrelevant questions in order that the party or witness, lost in the maze of questions, may not suspect what replies will favor the petition; but such a procedure, besides being below the dignity of an ecclesiastical court, will only result in prolonging unnecessarily the examination of the parties and witnesses, with consequent loss of time and effort on the part of the judges and all others connected with the court.

From what we have said concerning the content and form of the interrogatories to be prepared by the Defender of the Bond, it might at first hand appear that these interrogatories will contain a very large number of questions. And yet this

is not so. The interrogatory should be complete in that it is designed to bring out all the information that a particular witness may possess; but it should not include questions that would apply to any and to all witnesses indiscriminately and without respect to the particular facts or statements to which a certain witness is expected to testify. Naturally, if the Defender of the Bond does not know what specific information he is looking for in an individual witness, he will be tempted to formulate many questions to be as exhaustive as possible, and most of the replies of the witness will be: " I don't know ". Hence, as we mentioned previously, before drawing up his interrogatories, the Defender of the Bond must be well versed in all the phases and circumstances of the case, and know just why a witness has been presented, and what knowledge he has to impart. In this way the interrogatory will not be a stereotyped list of questions that could be proposed to any one and of which many would be irrelevant.

It is interesting to note that in a specimen trial on the grounds of force and fear given by a well known author on the matrimonial process, we find only eleven questions for the plaintiff and twelve for the defendant. The questions for the witnesses vary in number from four to twelve.[4] And yet these questions were sufficient to bring forth conclusive evidence of invalidity on the grounds stated. The writer is ready to grant that here in this country where people are under the impression that questions in court are to be answered as briefly as possible, more questions might have been necessary to bring out the same amount of information, but the questions would not have to be multiplied to any great extent. In the writer's experience with a large Metropolitan Tribunal, the average number of questions in an interrogatory would vary from twenty-five to thirty-five, and in exceptional cases it would not exceed forty.

This matter of the length of the interrogatory should be kept in mind particularly when a witness is being examined through a rogatory commission in another diocese. Nothing

[4] Torre, *Processus Matrimonialis* (Naples, 1947), pp. 232 ff.

can be more aggravating for an already over-burdened judge than to open the sealed interrogatory in the courtroom in the presence of the witness and find that there are one hundred twenty-six or more questions to be proposed in that hearing! Canon 1570, § 2 gives the right to a tribunal to call upon another tribunal for assistance in performing certain judicial acts, among which is listed specifically the examination of the parties or witnesses; and the tribunal whose assistance is sought has a corresponding duty to expedite the preparation of the judicial acts requested. But the request should always be reasonable, and courtesy, if not a sense of justice, requires that the rogatory commission be capable of execution with minimum inconvenience to the tribunal whose aid is invoked. The tribunal very likely will have to set aside its own cases to attend to the rogatory commission, and it is unfair to ask it to serve extraordinarily long interrogatories which are time-consuming and trying, when the information that is being sought could be obtained through a shorter interrogatory.

The Defender of the Bond preparing interrogatories for witnesses outside the diocese should keep in mind that the judge assigned to the rogatory commission and the Defender of the Bond, who must also intervene, have the same right as the judge and the Defender of the original tribunal to propose questions *ex officio* in the course of the judicial examination. If, therefore, the witness is too vague or indefinite in reply to the questions drawn up by the Defender of the Bond of the tribunal issuing the rogatory commission, the supplementary questions in the examination would ensure a satisfactory deposition much better than an exceedingly large number of questions, many of which could not but be suggestive and others superfluous or not pertinent.

To help the judge who is to question the witness, the *Officialis* requesting the rogatory commission should in the covering letter explain not only the nature of the case, that is, whether the grounds alleged is insanity, exclusion of the *bonum prolis,* etc.; but he should also indicate what precise knowledge the witness possesses or is alleged to possess, drawing his attention

particularly to the numbering of the questions formulated to bring out this knowledge. Of couse, the information as to which questions are the really important ones for this witness would have to be submitted to the *Officialis* beforehand by the Defender of the Bond, since the *Officialis* would not know the order of the questions enclosed in the sealed envelope. Or again, the Defender of the Bond could with the rogatory letter include instructions to the Defender of the Bond of the rogatory commission, briefing him on the status of the case, whether it is fairly simple or complicated, whether contradictory testimony has been received on a particular matter, and pointing out what this witness can contribute to the clarification of the whole case. In this way, two defects would be avoided: the drawing up of marathon interrogatories by the Defender of the Bond in his desire to be exhaustive for fear of having to request a second hearing of the witness, and the failure of the rogatory commission to secure from the witness a deposition that is complete and satisfactory because the assisting tribunal was not sufficiently acquainted with the various aspects of the case.

It could be asked here whether it would be permissible for the Defender of the Bond to entrust the formulation of the interrogatories to the Defender of the Bond of the rogatory commission, or whether it would always be necessary for the Defender of the issuing tribunal to forward the sealed interrogatories. The first procedure would seem to be very convenient in certain cases, e.g., when there are several witnesses to be heard in another diocese, or when the witnsses speak a different language than that used in the place of the main tribunal. The Defender of the Bond of the assisting tribunal could then phrase his questions, taking into consideration the mentality of the people and the idioms used in that country. It seems, however, that the Defender of the Bond has no choice in this matter, and that the interrogatories must always accompany the request for the rogatory commission. Canon 1570, § 2, is not explicit here, merely stating that the tribunal whose aid is invoked must observe the norms laid down in law for each act. But the *Regulae Servandae* for the process of

non-consummation, in dealing with the hearing of witnesses in other dioceses, decress in number 23 that the judge should request the Ordinary of the witness to cite him before his own tribunal, and there examine him according to the questions of the Defender of the Bond that were sent to him. Since it is fairly evident that the greater part of the *Regulae Servandae* is merely a more explicit statement of the law of the Code, the procedure outline there would have to be followed.

We have dwelt at some length upon the function of the Defender of the Bond in presenting his written observations on the case, and particularly in drawing up interrogatories for the parties and the witnesses. Before concluding this paper, one might well make a few brief remarks on other phases of the Defender's activity.

In a letter of August 15, 1949, addressed to all local Ordinaries and judges of matrimonial courts, the Commission of Vigilance of the Sacred Congregation of the Sacraments deplored the fact that the Defender of the Bond oftentimes remained inactive in the fact-assembling stage of the process, and was not sufficiently alert to present witnesses *ex officio* after accurate information had been obtained in the places where the parties were well known or from persons who would be apt to state the true facts in the case dispassionately and without interested motives.[5] It does happen at times that close relatives of the parties, who must have had some knowledge of the facts of the case, are omitted from the list of witnesses submitted by the parties. Such omissions can be deliberate if the parties know that their appearance in court could be harmful to their contention. It then belongs to the Defender of the Bond to inquire prudently into the availability of these persons to testify and to find out beforehand what information they might possess pertinent to the case. In this connection, it is to be noted that Article 72 of the Instruction *Provida* authorizes, and if the case demands, obliges the Defender of the Bond to seek opportune information, especially from the Defender of the Bond of that diocese where the marriage was contracted.

[5] Cf. Bouscaren, *The Canon Law Digest*, Vol. III, pp. 630-631.

The activity of the Defender of the Bond is important at all stages of the trial. The Code of Canon Law insists that he be cited for all judicial acts and punishes with invalidity any act at which he was not present due to failure to cite him. Certainly the Defender of the Bond should make every possible effort to be present at the examination of the parties and the witnesses. It is rather irksome for a judge studying the acts of a case to read at the beginning of most hearings: "*Defensor Vinculi abest ob alia negotia necessaria*"; and he begins to suspect that perhaps these other "*negotia*" may not be as necessary as indicated, and wonders if the Defender should not be admonished to greater diligence or should not even be replaced by some one more interested in the work.

The intervention of the Defender of the Bond is required not only in formal trials, but also in the informal process of Canon 1990. Since this process is documentary in character, his work is greatly simplified, but his responsibility in protecting the marriage remains the same. He must, therefore, be cited in such cases, and must examine most carefully the documents submitted with regard to authenticity and probative value. He should, before the sentence of the delegated judge, present his written remarks, which, however, need not be as extensive as in a formal trial. His greatest responsibility in this type of case concerns his right to appeal. Unlike the formal trial where appeal is mandatory from an affirmative sentence in first instance, it is left to his conscience and his prudent judgment to interpose an appeal from the delegated judge's sentence. Nor should he be deterred from doing this by any consideration of persons. The Apostolic Delegate in a letter to the Bishops of the United States under date of September 8, 1955, has this to say: "Defenders of the bond should be reminded of the need for scrupulous observance of Canon 1991 in which '*provocare tenentur ad iudicem secundae instantiae*' each time '*prudenter existimaverint impedimenta de quibus in can. 1990 non esse certa aut dispensationem super eisdem probabiliter intercessisse*'.

Clearly, this is a question of the greatest practical importance if obvious inconveniences are to be avoided. In the interest of truth and justice the Most Reverend Bishops should so act toward the defenders of the bond that they will not be tempted to be silent or to fulfill timidly their most serious duty because of reverential fear of the Ordinary or his delegate who has declared for nullity according to Canon 1990. Here the question is not one of the dignity of the persons judging but of a fitting and efficacious defense of marriages that have certainly been performed."

Finally, some tribunals, it would seem, have the notion that the Defender of the Bond does not have to intervene in "*in favorem fidei*" processes to be forwarded to the Holy Office. It should be pointed out that the *Normae* of the Holy Office of May 1, 1934, dealing with such processes state in Article 7, § 1, that in the preparation of the interrogatories to be proposed to the parties, the judge auditor should avail himself of the services of the Defender of the Bond or of some one else delegated to this function in each case, and paragraph 3 of the same article refers to questions prepared beforehand.

Although there is no mention in these *Normae* of the remarks of the Defender of the Bond, a private letter received some time ago from an official of the Holy Office suggested that the Defender of the Bond write his opinion on the case in relation to the nonbaptism, the credibility of the witnesses, the sincerity of conversion, or even the possibility of scandal. "Naturally", he continues, "the Ordinary will afterwards when presenting the case answer any objections of the Defender of the Bond. But without these observations there is always a delay or a basis for the *Defensor Vinculi* of the Holy Office to protest". Even though, therefore, the process "*in favorem fidei*" does not deal with the validity or invalidity of the bond, it does, like the process "*super rato et non consummato*", have to do with the continuance or not of the bond, and we know how stringent are the provisions for the intervention of the Defender of the Bond in this latter type of process. At any rate, it is strongly advisable that the De-

fender of the Bond take an active part in "*in favorem fidei*" cases, especially if this will hasten the issuing of a decision.

As can be seen from these considerations on the function of the Defender of the Bond, his responsibility in the matrimonial process is very great indeed, second only to that of the judges; and it is a responsibility which he should never take lightly. The faithful and vigilant discharge of his duties will demand a great deal of time, painstaking effort and generous self-devotion. But excessive and misplaced zeal for the defense of the marriage bond should never lead him to become a zealot. He should often recall to mind not only the wise admonitions of Pope Pius XII, which we gave at the beginning of this paper, but also this equally pertinent quotation from another allocution of His Holiness to the Auditors of the Rota: "It should not come about that what the will of the legislator intended as a help and security for discovering the truth, become instead an obstacle to its discovery." [6] It would indeed be sad if the "*pars necessaria ad iudicii validitatem et integritatem*" [7] should ever become a nuisance and an obstruction to the attainment of the single purpose and end of the matrimonial trial, toward which all the individual participants should devote their effort in mutual co-ordination and with a common orientation, namely the discovery, ascertainment and legal affirmation of the truth, the objective fact.

Let the Defender of the Bond be mindful, therefore, that success in his office is to be measured not by the number of negative decisions issued by the tribunal, but by the agreement of the final sentence with objective truth. If he approaches his work with this attitude, instead of with a "Defender of the Bond mentality", not only will he justify the hopes of Pope Benedict XIV when he established this office, but he will contribute in no small measure to the higher end of the Church, to which all its judicial activity is directed and subordinated: the welfare and salvation of souls.

[6] Allocution to the Auditors of the Rota, Oct. 1, 1942; English translation in Bouscaren, *The Canon Law Digest*, Vol. III, pp. 605ff.

[7] Benedict XIV, Constit. *Dei miseratione*, 3 Nov. 1741, § 7—*Fontes*, n. 318.

Cases and Studies

COMPLIANCE OF CATHOLICS WITH CIVIL REGULATIONS ON MARRIAGE

Certain it is that the competence of the Church is not limited to the marriages of Catholics but extends to the marriages of all Christians. For practical reasons, however, the present article is restricted to a discussion of Catholic compliance with civil regulations on marriage. But what is said of such compliance on the part of Catholics will, other things being equal and due allowance being made for particular circumstances, apply likewise to the observance of the same regulations on the part of baptized non-Catholics.

The State acts within its proper sphere of authority when it enacts certain prescriptions that pertain to the purely civil effects of marriage.[1] Conformity of Catholics with such laws is rightly to be expected: with these matters the present discussion is not concerned. But on the other hand, it is here pointed out that State marriage laws are legislated and applied in such a way as to present many points of conflict with the jurisdiction of the Church. The problem of Catholic compliance with these laws is of extreme practical importance. It will be of interest, then, to make some inquiry into that compliance, to determine whether it may be admitted, and, if so, to what extent and on what grounds. The factors fundamental to the discussion are both theological and juridical. The first must necessarily be given some consideration, but the character of the present study demands that greater attention be paid to the second.

It must be noted that when civil matrimonial regulations are invalid for Catholics—invalid for them because the State has legislated outside its own sphere of competence—the Church permits Catholics to observe such laws as long as they are proper, that is, as long as they are not contrary to the natural or the divine positive

[1] Cf. Goldsmith, J. William, *The Competence of Church and State over Marriage—Disputed Points,* Canon Law Studies, n. 197 (Washington, D. C.: The Catholic University of America Press, 1944), pp. 58-59, concerning civil registration of marriage, in view of the consequent purely civil effects.

law or detrimental to the Church.[2] Compliance with these regulations is justified theologically on the basis of the precept of charity; there is a certain obligation to observe these laws—an obligation that arises not from the laws themselves but from the precept of charity.[3]

Considering the question, then, from a theological viewpoint, one may state that Catholics may comply with civil regulations that infringe upon the competence of the Church, provided that these regulations do not exact or presuppose contraventions of the law of God and are not positively harmful to the Church. Fundamentally, the attitude of the Church towards this compliance is founded in her maternal solicitude for the temporal as well as the spiritual welfare of souls. Pope Leo XIII takes cognizance of this disposition of the Church when he says: " It is of the greatest consequence to husband and wife that all these things [scil., concerning the origin, nature, ends, properties, and regulation of marriage] should be well known and understood by them, in order *that they may conform to the laws of the State, if there be no objection on the part of the Church;* for the Church wishes the effects of marriage to be guarded in all possible ways, and that no harm may come to the children." [4]

Such, then, is the theological approach to the problem. But before considering in detail the juridical aspect one may well observe that herein lies another striking illustration of the intimate and harmonious interrelation of theological and juridical principles. The central link in this case is charity. Commenting on charity as " an ethical and legal fundamental ideal which fills the Law of the Church with the fullness of humanity," Plöchl quite appositely remarks: " It is true, the Law of the Church is strict in its unchangeable Divine and Natural principles. But it is also the law of charity. It is ruled by charity . . . [charity] is the sublime norm, guiding the spirit of the Code in its every phase. It is the basic principle of distributive justice, the supreme criterion of every aspect of the

[2] Cf. Goldsmith, *op. cit.*, p. 57.

[3] Cf. Goldsmith, *op. cit.*, pp. 59-61.

[4] Ep. encycl. *Arcanum Divinae,* 10 feb. 1880, § 25—*Fontes,* n. 580; *The Pope and the People* (*Selected Letters and Addresses on Social Questions*) (London: Catholic Truth Society, 1937), 42. (Italics supplied by the writer.)

Law of the Church." [5] It is obvious from this that the fundamental ideal of charity is basic to both the theological and the juridical elements involved in the problem under consideration. Prescinding for the time from that factor, one has now to inquire into the essentially juridical phase of the question, and to seek to determine the juridical grounds which support and justify Catholic compliance with civil regulations on marriage.

Approaching the matter first from the standpoint of the rights of Church and State, one should note that in this country the conflict of competence arises proximately from a usurpation of power. The State does not deny to the Church the *right* to legislate for Christian marriages, but it does deny the *exclusiveness* of that right. The State has assumed to itself a power that properly and rightly belongs to the Church. But in exercising this usurped power the secular authority seldom if ever acts from motives of positive hostility towards the Church. This fact in itself makes the problem of conformity to civil prescriptions less difficult, for, although there are certain fundamental contrarieties between the two systems of law, still there are many elements of concord which provide a basis for a composition of the difficulties. Hence the Church is able to accommodate herself to practically all civil regulations without great inconvenience; and this she is willing to do as long as there is not required any abandonment of principle. As Pope Leo XIII says: ". . . the Catholic Church, though powerless in any way to abandon the duties of her office or the defence of her authority, still very greatly inclines to kindness and indulgence whenever they are consistent with the safety of her rights and the sanctity of her duties. Wherefore she makes no decrees in relation to marriage without having regard to the state of the body politic and condition of the general public; and has besides more than once mitigated, as far as possible, the enactments of her own laws, when there were just and weighty reasons." [6]

An example in point may be found in the way in which the Church meets the requirement for civil authorization to assist at marriages which is enacted in the laws of some states. The

[5] "Fundamental Principles of the Philosophy of Canon Law."—*The Jurist* (Washington, D. C.: 1941—), IV (1944), 97-98.

[6] Ep. encycl. *Arcanum Divinae,* 10 feb. 1880, § 21—*Fontes,* n. 580; *The Pope and the People,* 40.

Church, fully aware that her own authorization is sufficient for the validity of assistance at marriage on the part of her priests, yet has them secure the necessary civil authorization. By thus meeting this secular prescription the Church can be assured that, other things being equal, the civil effects will be conceded by the State to a marriage solemnized according to the canonical form.

It seems, moreover, that a further juridical basis for the observance by Catholics of secular marriage laws can be established from the practice of the ecclesiastical courts in matrimonial causes. Among the documents usually required of parties by the ecclesiastical tribunals are the documents of civil divorce. Wanenmacher makes the following comments on this practice: "In matters where the civil courts are not competent, such as when they declare marriage between Christians invalid, the dispositive part of such a decision has no value. Yet in nearly every case of nullity, Pauline privilege, or dispensation from ratified marriage, tried in diocesan court, it is necessary to present the papers of civil divorce. This is the common practice and is prescribed in some dioceses."[7] This is done not only for the purpose of securing possibly useful information, but also with the aim to avoid conflict with the civil law which does not acknowledge the competence of the ecclesiastical tribunal, and to protect the parties from a consequent civil charge of bigamy.[8] In such matters, again, there is no departure from principle, for it is a question not of requiring a divorce *as a divorce,* but rather of complying with a secular legal formality in order to secure civil recognition for an act of ecclesiastical jurisdiction that is complete in itself.

Certainly it would be to the advantage of both Church and State in this country if through some formal agreements a definite settlement of the various points of conflict could be effected. But the absence of such an express agreement does not necessarily militate against the existence of an amicable functioning of these two authorities. The practical manner in which the difficulties and problems have been met by the Church in this country, together with

[7] *Canonical Evidence in Marriage Cases* (Philadelphia: Dolphin Press, 1935), n. 345.

[8] Doheny, *Canonical Procedure in Matrimonial Cases* (Milwaukee: Bruce, 1938), 286-287; cf. also Hannan, "Civil Divorce Requisite for Ecclesiastical Adjudication?"—*The Jurist,* IV (1944), 160-161.

the at least benevolent (even if patronizing) disposition of the State towards the Church, have resulted in the establishment of an implied *modus vivendi*. Such an arrangement, because not founded on any mutual understanding as to principles, has the obvious disadvantage of providing a somewhat tenuous juridical basis for settling any particular matter of conflict; but, on the other hand, it has averted, in an acceptable manner, the practical burgeoning of many potential theoretical conflicts.

From this implicit *modus vivendi* there has developed in this country an almost universal practice to observe the civil regulations on marriage within certain limits, i.e., within limits consonant with the safety of the rights of the Church and consistent with the sanctity of her duties. This compliance is not only manifested by priests and bishops; it is also encouraged and at times even required of the faithful by them. It seems, moreover, that this mode of acting, especially since it has developed in such a way as to secure the unhampered functioning of ecclesiastical jurisdiction and at the same time to procure the protection in civil law of the rights of the spouses, may be said to have at least the tacit approval of the Holy See.

If the matter be regarded from the standpoint of the individual and his rights, it appears that there are certain other juridical factors that justify his compliance with the civil regulations in question. The right to marry is one of the innate rights that man has from the natural law. Further determined by the divine positive law, this right to marry receives a formal declaration in the Code of Canon Law.[9] Around this right is built up a system of rules embodying not only the principles of natural and divine positive law, but also the further determinations of ecclesiastical law. Through the norms of the Church law the principles of the divine law are determined to more definite purposes—but always with a view to the most effective preservation and application of these principles. It is recognized that in particular cases there may sometimes arise a difficulty in harmonizing the fulfillment of the positive specifications with the attainment of the fundamental rights envisaged in the principles themselves.

It is at this point that the principle of equity enters to effect the operation of the natural law over and beyond the human positive

[9] Canon 1035.

law. And where even this natural equity fails to solve the disparity between justice and a strict application of the law, there is a last resort in the principle of *epicheia,* or personal equity. In the right application of these principles of justice and equity there exists a solid juridical basis for the observance by Catholics (within the limits already explained) of the civil regulations on marriage. The recognition and development of these principles flow directly from that basic charity in the law of the Church which, though leaving intact the strictness of that law, yet removes from it any semblance of a cold and unsympathetic formalism. More remotely, this operation of the law of the Church flows from the supernatural aim of the Church—which is the sanctification and salvation of souls.

What has been said thus far regarding compliance with civil laws applies principally to the positive prescriptions of these laws. A final observation must be made concerning the civil laws which in their prohibitory provisions trespass upon the competence of the Church. For a Catholic, under ordinary circumstances, these prohibitions will work no great hardship. The Church generally encourages Catholics to observe them not only to avoid conflict with the State but also to promote their own good and the public welfare.

The Church does not forbid as such either interracial marriage or the marriage of persons afflicted with a communicable social disease.[10] The Church, unlike the State, realizes that at times and in particular cases there may be just reasons or excusing causes in conscience that will justify such marriages. But since the State does not recognize the existence of excusing causes, the law prohibiting these marriages is applied strictly in all cases, and violators are subject to severe civil penalties. Since such a law is invalid for a Catholic (and even unjust, in the hypothesis that there are excusing causes), he would be justified in going into another state where the prohibition does not exist, in order there to contract marriage before a priest and two witnesses according to the substantial canonical form.

When for one reason or another this solution of the problem would be impracticable (as might be the case if the parties were

[10] Cf. Goldsmith, *op. cit.,* pp. 85 and 66-67.

very poor), Catholics wishing to contract marriage under the circumstances outlined could do so before two witnesses alone, according to the norm of canon 1098.[11] The use of this latter form will, of course, effect a valid and licit marriage in the eyes of the Church, but the marriage will remain without any recognition before the secular law.

J. William Goldsmith, B.C.S., S.T.L., J.C.D.*

Columbia, S. C.

[11] Cf. *Pontificia Commissio Interpretationis,* 25 iul. 1931—*AAS,* XXIII (1931), 388. In the reply of the Commission it is stated that the physical absence of the pastor or Ordinary, as comprehended by canon 1098, includes also the case in which either of them, though materially present, cannot by reason of grave inconvenience assist at the marriage. Gasparri (*De Matrimonio,* n. 1017), commenting on this response of the Code Commission, states that the grave inconvenience which the Commission had in mind is that which may arise from a civil law which forbids marriage under grave penalties.

* This article, an excerpt from the doctoral dissertation of the author (cf. *supra,* note 1), is reprinted by the kind permission of the author and the courtesy of The Catholic University of America Press.—Editor's note.

Decrees and Decisions

CANONICAL

COMMUNICATION *RE* MICHAEL COLLIN

On Dec. 15, 1956, the Holy Office reminded everyone that by its decree of Jan. 17, 1951, the priest, Michael Collin (who is also known as Fr. Michael of the Infinite Love), who formerly belonged to the Congregation of Priests of the Sacred Heart of Jesus, had been reduced to the lay state.

By the same Decree was dissolved the association "*Institut des Apôtres de l'Amour Infini,*" which the aforesaid priest had pretended to found without the approval of competent ecclesiastical authority.

Since Collin, playing upon the good faith of ecclesiastics and of some women's religious institutes had dared to say Mass after his reduction to the lay state, the Sacred Congregation of the Holy Office notified Bishops, the clergy, whether secular or regular, and all those to whom is entrusted the care of churches or chapels, that he is still a layman for all juridical effects.

Bishops were notified also that Collin had been forbidden to reestablish under any name, the association dissolved by the Holy Office in the aforesaid Decree and to found any new ones.

The *Institut des Apôtres de l'Amour Infini* and that of the *Magnificat*, also founded by Collin against the express prohibition of the Holy Office, said the communication, are not recognized by the Church and it is forbidden to the faithful to belong thereto.

* * * * *

DECREE

The Sacred Congregation of the Council, on Jan. 21, 1957, issued a decree in the case of the Cistercian Father, Recared Horvath, who had engaged in machinations in Hungary against the legiti-

mate ecclesiastical authorities and had tried to subvert their power. The Sacred Congregation of the Council, therefore, according to the Decree *De ecclesiasticas officiis et beneficiis canonice instituendis seu providendis*, of June 29, 1950, by special mandate of the Sovereign Pontiff, Pius XII, declared the aforesaid priest had incurred an excommunication reserved to the Apostolic See *speciali modo*.

Further, the same Sacred Congregation, by virtue of the same special mandate decreed:

(1) Priests both secular and regular, who in Hungary—by reason of the fact that their nominations to ecclesiastical offices or benefices were found not in conformity with the dispositions of Canon Law or that the exercise of the functions assumed by them has not proceeded correctly—, have been removed or suspended in any way whatsoever by their own Ordinaries or by the Ordinary of the place from their office or benefice, or have been forbidden to exercise their orders, cannot be absolved or dispensed unless first:

they shall have absolutely and definitively renounced any offices or benefices in the church which they have thus far held and shall have obeyed the legitimate ecclesiastical authority in all things:

secular priests, who have come from another diocese, shall have returned thereto; religious priests shall have left the diocese in which they held the aforesaid offices or benefices.

(2) These same priests are declared *inhabiles* for obtaining offices in the diocesan curia, for canonicates, for any functions in cathedral churches and in seminaries, for the office of vicar forane, and for the function of pastor in the city of Budapest and in all cities and towns where there is the seat of a bishopric or of a vicariate forane. These offices, benefices and functions cannot in any way be conferred upon them without consulting the Apostolic See.

(3) If, however, these same priests—which God forbid—refuse to obey, they incur *ipso facto* an excommunication reserved to the Holy See *speciali modo*.

* * * * *

AFFINITY

The Holy Office, on Jan. 31, 1957, answered a question i.e., whether affinity, contracted *in infidelitate*, becomes an impediment for marriages, which are contracted after baptism, even of one party only. On Wednesday, Jan. 16, 1957, the Cardinals of Holy

Office decided to answer the proposed question affirmatively. On Thursday, Jan. 24, 1957, His Holiness, Pope Pius XII, in the audience granted the Cardinal Pro-Secretary of Holy Office approved and ordered the publication of the aforesaid resolution of the Cardinals of Holy Office.

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PROHIBITION OF BOOKS

The Holy Office, on Jan. 30, 1957, announced that in a general session of that Sacred Congregation, held Jan. 23, 1957, the Cardinals of Holy Office condemned and ordered placed on the list of forbidden books the works of Michael de Unamuno: *Del sentimiento tragico de la vida; La agonia del Cristianismo.* The Cardinals of the Congregation also decided that the faithful should be warned that even in other books by the same author there are to be found several things contrary to faith and morals. In the audience, on Thursday, Jan. 24, the Holy Father approved and ordered the publication of the decision.

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SEMINARIES AND UNIVERSITIES

On July 2, 1956, a decree was issued establishing a Higher Institute of Pedagogical Sciences in the Philosophy Faculty of the Pontifical Salesian Athenaeum, with the power to grant academic degrees.

On the same day a decree was issued establishing a Philosophical Institute in the Theological Faculty of the Catholic University of Angers, and to it was given the right to confer the academic degree of Bachelor of Philosophy.

On July 25, 1956, a decree was issued whereby a faculty of Philosophy was established in the Pontificial University of Salamanca with the power to confer academic degrees.

The Statutes of the Theological Faculty of the Catholic University of Beyrouth, known as St. Joseph's, were approved on Dec. 29, 1955.

On Feb. 17, 1956, the Philosophical and Theological houses of the Society of Jesus in Toronto were declared aggregated to the Philosophical and Theological Faculties of Montreal, this being reserved to the students of the Society.

On Feb. 23, 1956, the Theological Faculty of the Catholic University of Quebec (Laval) was allowed to confer the degree of Bachelor on the students in the minor course of Theology, i.e., the seminary course, if they satisfied particular conditions.

June 14, 1956, the Congregation decreed that the Theological house of the Regional Seminary of Tananarive was affiliated for a period of five years to the Theological Faculty of the Pontifical Gregorian University in Rome.

July 3, 1956, the Congregation approved the Statutes of the Institute of Social Sciences in the Philosophical Faculty of the Pontifical Gregorian University in Rome.

July 25, 1956, the Congregation declared the Higher School of Sacred Theology in the episcopal Seminary of Vitoria affiliated for a period of five years to the Theological Faculty of the Pontifical University of Salamanca.

Sept. 8, 1956, the Catholic Universiay of Campinas in Brazil was canonically established.

Oct. 2, 1956, a Faculty of Medicine was established in the Catholic University of Peru.

Dec. 7, 1956, the Theology school of the Benedictine Monastery of Liguge, in the diocese of Poitiers was declared affiliated to the Theological Faculty of the Catholic University of Angers, for a five year period.

On the same day the Theology school of the Scholasticate of the Congregation of the Sons of Mary Immaculate at Chavagnes-en-Paillers, in the diocese of Luçon, was declared affiliated for a period of five years to the Theological Faculty of the Catholic University of Angers.

Dec. 10, 1956, the Statutes of the Institute of Social Sciences in the Philosophical Faculty of the Pontifical Angelicum Athenaeum in Rome, were approved.

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ECCLESIASTICAL TRIBUNALS

Dec. 31, 1956, the Sacred Congregation for the Sacraments issued a decree regarding the arrangement of the ecclesiastical tribunals in the Philippine Islands for the deciding of cases involving the nullity of marriage in first and second instance. At the same time the same Congregation issued certain norms for carrying out this decree.

* * * * *

EDICTAL CITATIONS

The Sacred Roman Rota, on Dec. 11, 1956, cited Mr. Clive Rasleigh Davis, respondent in the case, *O'Sullivan-Davis,* which had begun in the Vicariate Apostolic of Cape Town.

Dec. 15, 1956, the Rota cited Mr. Richard Card, respondent in the case, *Hruska-Card,* which had begun in Chicago.

Mar. 2, 1957, the Rota cited Mrs. Mary Victoria Margaret Decotana Fernandes, respondent in the case, *Fernandes-Fernandes,* which had begun in Goa-Damão.

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CIVIL

FAIR TRIAL

The Court of Appeals of New York has held that a conviction can not stand when the prosecution, though given a chance to do so, does not admit to the court and jury that it has promised reduced punishment to one of its witnesses in return for cooperative testimony. The defendant in the case was convicted of possession of narcotics with intent to sell. Another man had been apprehended and had implicated the defendant, and had pleaded guilty before a different judge to the same charge. It was understood, however, that he would be permitted to withdraw that plea and plead guilty to a lesser offense if he would continually and truthfully cooperate with the district attorney. Counsel for the defendant attempted to elicit this information at the trial of the defendant but the witness denied it and the prosecutor, who knew of the agreement, remained silent. The Court of Appeals reversed the conviction for this reason, remarking that although the other evidence clearly tended to establish the defendant's guilt, the trial could "not in any real sense be termed fair." It went on to say, "The administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach. The prosecutor should have corrected the trial testimony . . . forthrightly exposed the lie, so that the court and jury would have known that the witness had reason to expect lenient treatment for continued cooperation."

* * * * *

ALIMONY

The Supreme Court of Florida has ruled that a husband's estate cannot be split up and alimony in gross awarded in a separate maintenance suit. The wife had been awarded a lump-sum alimony of $200,000. The Florida statute allows the wife, if she is living apart from her husband, and if a cause of divorce exists in her favor, to " obtain alimony without seeking a divorce . . . and the court shall have power to grant such temporary and permanent alimony . . . as the circumstances of the parties may render just." The Supreme Court of Florida, however, could find no statutory or independent equity authority to allow separate-maintenance alimony in any form other than periodic payments. It held that there was no " justification . . . to divide up the husband's assets and deliver a portion of them in bulk to the wife while simultaneously continuing the marriage relationship and leaving vested in her all of her rights as a wife in the husband's remaining assets." Even if there was danger that the husband might move from place to place, so that enforcement of a periodic payment decree would be difficult, the Court felt that the Chancellor could issue a writ establishing some sort of security for the payments.

* * * * *

CONFESSIONS OF CRIMINALS

The Court of Appeals for the District of Columbia Circuit has reversed a second-degree murder conviction of a woman who was held by the police for about sixteen and a half to nineteen and a half hours before she confessed, and was not taken before a magistrate until more than twenty-four hours after the arrest. Four of the majority asserted that the *McNabb* rule, regarding confessions, primarily means that confessions are excluded from admission in evidence in federal cases if they are obtained while the defendant is being illegally held, i.e., if the person is not taken before a magistrate " without unnecessary delay," according to Rule 5(a) of the Federal Rules of Criminal Procedure. The *McNabb* rule " operates as a sanction against police irregularities that create an *opportunity* (italics by the Court) for third degree methods by compelling an accused to face his questioners incommunicado, uncounseled, and uninformed of his rights."

Two members of the majority said that the *McNabb* rule requires not only that there be illegal police detention for questioning, but also that the confession be a product of the detention. The three dissenting judges agreed that this is the meaning of the rule, but felt, contrary to what the two aforesaid members of the majority felt, that the confession in question was voluntary and not the product of her being detained and questioned over a Sunday before being brought before a committing magistrate. Thus, the minority held that the confession was not to be excluded under the *McNabb* rule.

* * * * *

SEARCH AND SEIZURE

The California District Court of Appeal, First District, has held that evidence of one crime is not admissible if gained by a search as a result of the defendant's arrest for another crime of which he was obviously not guilty. The defendant had been under surveillance for some time and was apparently suspected of being a bookmaker. He was, however, arrested for vagrancy. After his arrest the police searched his car and seized the only real evidence relating to bookmaking, the crime for which he was finally convicted. The Court of Appeal found that there was no reasonable suspicion for the vagrancy arrest and that it was only a subterfuge to apprehend the defendant. The arrest not being proper, the search, predicated on an illegal arrest, was improper. Giving the officers the keys to his car was not, under the circumstances, said the court, a real consent to the search.

* * * * *

HOSPITAL NURSES

The Supreme Court of Vermont has held that a nurse employed by a hospital is not the agent of the hospital when she is working under a doctor's instructions in an obstetrical delivery room. It, therefore, held that the hospital-employer is not liable under such circumstances for an injury caused to a patient by the nurse's application of pressure to the patient's ribs, undertaken at the direction of a doctor selected by the plaintiff and not employed by the hospital. The essential question, said the Court, is: Who has the right to control the offending servant in the performance of his work at the time in question? When a nurse employed by a hos-

pital is placed at the disposal of a physician or surgeon, as in an operating or delivery room, the doctor becomes the master. The hospital was the general master, but the doctor was the special master, under the circumstances. Therefore, the hospital could not be liable for the alleged negligence of the nurse.

* * * * *

CRIMINAL INSANITY

The Court of Appeals for the District of Columbia Circuit did not do away entirely with the rule of *McNaghten's Case* when it handed down the *Durham decision. McNaghten* established the classic test of insanity as: whether the defendant could tell right from wrong. The *Durham* case held that the advance of psychiatric knowledge has demonstrated the fallacy of such a narrow approach and that the inquiry should be whether the charged criminal conduct was the result or product of a diseased mind. The Court did not, however, intend to bar all use of the older tests. "Testimony given in their terms may still be received if the expert witness feels able to give it, and where a proper evidential foundation is laid a trial court should permit the jury to consider such criteria in resolving the ultimate issue 'whether the accused acted because of a mental disorder.' In aid of such a determination the court may permit the jury to consider whether or not the accused understood the nature of what he was doing and whether or not his actions were due to a failure, because of mental disease or defect, properly to control his conduct." The ultimate issue, however, must be defined to the jury in the terms of the *Durham* decision.

* * * * *

DIVORCE: COOLING-OFF PERIOD

The Supreme Court of Illinois had held that the 1955 Illinois statute providing for the commencement of a matrimonial action by the filing of a request for summons, with immediate issuance of summons and service on the defendant, though sixty days must elapse before a complaint may be filed or a decree entered, avoids the difficulties for which the 1953 act was held unconstitutional. In the 1953 act matrimonial actions were to be commenced by the filing of a "statement of intention" to file a suit. Sixty days

then had to elapse before a complaint could be filed and summons issued, and in the mean time the trial judge was to request a voluntary conference of the parties. The act was condemned because it did not accord to litigants their constitutional right to immediate access to the courts, and because it imposed non-judicial duties on judges in violation of the separation-of-powers provisions of the constitution. The 1955 act, however, permits immediate access to the courts. Since divorce is a non-common law action, however, reasonable post-jurisdictional delays may be imposed if in accord with constitutional provisions.

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SUFFICIENCY OF NOTICE

The United States Supreme Court has ruled that publication in the city newspaper of notice of a land condemnation proceeding was not sufficient to satisfy the due process requirements of the Fourteenth Amendment, declaring that " notice by publication in too many instances is no notice at all." The city of Hutchinson, Kansas, had sought to condemn certain land in order to extend one of its streets. The only notice given to the owner was publication in the official city newspaper. The commissioners awarded damages and the owner took no appeal within the statutory period. Later he began suit in a state court alleging that he had not known of the condemnation proceedings and that newspaper publication was not sufficient notice. Both the trial court and the Kansas Supreme Court denied him relief. The U. S. Supreme Court reversed and remanded, citing the rule that " notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests." While no rigid formula can be set up to determine what kind of notice must be given, in this case there appeared to be no reason why direct notice could not have been sent to the owner, since his name was known to the city and was on the official records.

Thomas Owen Martin

Book Reviews

PROBLEMS IN CANON LAW. William Conway, D.D., D.C.L. The Newman Press, Westminster, Maryland, 1956. Pp. xii-345. Price $5.50.

For some years *The Irish Ecclesiastical Record* has carried in its Canon Law section a series of questions and answers. The replies covered the whole field of Canon Law. Under the apt name of problems in Canon Law, these replies are now published as a book.

There are, of course a number of American subscribers to this Irish magazine and for them the present publication will be more a convenience than a vehicle of instruction. For non-subscribers, however, this book will prove to be a real help in understanding the principles and text of Canon Law. Many of the questions submitted to the magazine dealt with difficult problems and their answers were given in clear and concise language explaining the law itself and its application. In some instances, the canonical principles underlying the situation were suitably expounded. Concepts, for instance, of *iura quaesita, grave incommodum, negotiatio, potestas dominativa* can scarcely be properly explained in a few words and the canonist who answered the questions in the magazine gave them the necessary time and attention.

This book carries an index of sufficient length and detail. While this book is not altogether necessary for the canonist it will be useful to have at hand for the problems raised in it are met and, when possible, competently solved.

FUNDAMENTAL MARRIAGE COUNSELING. John R. Cavanagh, M.D. The Bruce Publishing Company, Milwaukee, Wisconsin, 1957. Pp. xxiv-598. Price $8.00.

Professional counselors have, in many instances, done a highly satisfactory job in marriage counseling. But the utility of such counseling has gone beyond the abilities of professional counselors. Clergymen everywhere can be expected to participate in this useful work and the main task for Catholic clerics will fall naturally upon

pastors and their assistants. However, since most of these clerics have not had themselves instructions in marriage counseling a book like this one by Dr. Cavanagh will be very helpful.

The author divides his book into sections dealing with the biological, sexual, social and religious aspects of marriage. Each section is itself divided into articles which stress the more important aspects of marriage. Some of these articles are not written by the author but are contributions of responsible and competent professional men. There is a clarity in all these articles which should appeal to readers. In no case, however, is there an attempt to exhaust a subject for the purpose of this book is not to educate completely in any one field but to present enough instruction and information so that the marriage counselor can adequately perform his task. It is understood that marriage counseling requires a broad knowledge of principles and facts and these are abundantly supplied by Dr. Cavanagh.

There are two separate articles on Law and marriage. Canon Law and marriage is contributed by Dr. Romaeus O'Brien, O. Carm., of the Faculty of the School of Canon Law at the Catholic University of America. The civil law concerning marriage is written by the Honorable Matthew F. McGuire of the U. S. District Court for the District of Columbia. Both these articles are excellent surveys of law and marriage. The power of the Church and State over marriage is explained. Dr. O'Brien's article will supply a refresher course for clerics and at the same time properly elucidate the law of the Church for non-clerics. Dr. McGuire's article on the civil law of marriage will similarly refresh the memory of civil lawyers and at the same time furnish needed information on civil law to clerics.

Dr. Francis Connell, C.Ss.R., also of the Catholic University contributes an article on the moral aspects of marriage. Dr. John O'Sullivan of the same University writes on Liturgy and marriage. Both articles are distinct contributions to a book on marriage counseling.

The author's bibliography is well constructed and properly divided into sections covering the many aspects of marriage. A glossary, largely of technical terms, is provided. The index is complete and will be useful.

THE LAW PROPER TO THE CONFEDERATION OF MONASTIC CONGREGATIONS OF THE ORDER OF ST. BENEDICT. Translated and annotated by Bernard A. Sause, O.S.B. The Abbey Student Press, Atchison, Kansas, 1953. Pp. 85.

A recent number of *The Jurist* carried a review of the Pontifical document organizing the Benedictine Congregations into a Confederation.* The present work is a translation of this document.

As the translator admits, this work adheres very closely to the Latin syntax and vocabulary. This has some advantages for it approximates the textual authenticity of the original document. Moreover, some reflection was needed to choose terms which would faithfully portray the precise meaning of the Latin terms. Yet, in one instance at least, a term was chosen which, while faithful to the Latin word, creates a poor image in English. Why, for instance, is the Latin term *fratres conversi* translated as "converse brothers" instead of the usual term "lay brothers"?

The monks of the Order of St. Benedict will find this translation adequate. But they will miss some of the interpolated canonical notes found in the Latin edition. The translator adds some notes which illustrate the paragraphs of the *Lex propria*. These are to a large extent translations of pertinent canons of the Code of Canon Law.

The appendix contains translations of apposite documents from Leo XIII to Pius XI. The index is sufficiently detailed and will be useful. Where the Latin text of the *Lex propria* is not available the translator's efforts will be a satisfactory substitute.

THE CELEBRATION OF MARRIAGE IN CANADA. Leo G. Hinz, O.S.B. Universitas Catholica Ottaviensis, Series Canonica Nova, Tomus 2. The University of Ottawa Press, 1957. Pp. xvi-190.

Comparative studies are interesting and the book under review is no exception. The law relative to the celebration of marriage in Canada is divergent. The province of Quebec has a civil Code and is not considered in this work. In the other provinces of Canada marriage laws are largely uniform with, of course, some differences in the separate provinces. It is the purpose of this dissertation to compare these laws with the Code of Canon Law.

* See *The Jurist*, XVII (1957), 114-115.

Like in all well constructed dissertations, the author considers first the historical development of marriage legislation. This begins with the background in England and continues with separate chapters on the ecclesiastical and civil marriage legislation. The remainder of the work is a study of the present legislation on the celebration of marriage in Canada. Chapters are devoted to persons authorized to solemnize marriage, preliminaries to the issue of licenses or publications of banns, the actual celebration of marriage and, finally, to its registration. All these chapters are subdivided to permit closer discussion of points like parental consent, health examinations and the presence of witnesses.

To students of comparative law, the historical background of the author's specific subject will be of considerable interest. Gathered together here is a list of pertinent marriage laws arranged according to the separate provinces of Canada.

To students of Canon Law, the discussion of these civil laws in reference to canonical marriage will be of more than ordinary interest. Officials of ecclesiastical courts will also find adequate consideration of the conflict of laws.

The author concludes that, on the whole, the position of the Church on marriage legislation is not too unfavorable. At least, there is no serious hindrance to the proper celebration of marriage. Some points, however, need to be resolved.

The author is to be commended on the presentation of his bibliography. Civil statutes, for instance, are carefully collected according to their territorial obligation. Periodicals are properly set apart from reference works. The index covers several pages and is entirely satisfactory.

A COMPARISON OF THE MATRIMONIAL IMPEDIMENTS OF THE STATE OF OHIO AND THE CODE OF CANON LAW. Rev. Francis A. Karwoski. Pontificium Institutum Utriusque Iuris. Theses ad Lauream N. 107, Romae, 1955. Pp. 74.

In the preface to his dissertation, the author promises an extensive comparative study of the matrimonial impediments of the state of Ohio and the Code of Canon Law. Undoubtedly, the complete dissertation as it was submitted to the Faculty of the Pontifical Institute of Law fulfilled this promise but the excerpt published

leaves the reader with a sense of loss. This feeling is common enough in the face of excerpts from doctoral dissertations. Various reasons are assigned for this practice and the student may avail himself of the concession to publish partially but the effect on the canonist is one of frustration.

In the excerpt published, the author discusses impediments and dispensation in general, impediments in the strict sense and impediments in the wide sense common to the Code and Ohio law. The last chapter considers, for instance, force and fear, error and fraud. The author's discussion of these topics is satisfactory and will be of some help in the examination of marriage cases.

The bibliography is divided properly into separate sections devoted to canon and civil law. A list of pertinent periodicals is added to each section. There is no index.

CULTURA CRISTIANA NELLA LUCE DI ROMA. Andrea Jullien. Desclée & Ci., Editori Pontifici, Roma, 1956. Pp. 110.

Some time ago the content of this small volume was addressed to the students of the school conducted by the Roman Rota. The purpose of this communication was, in brief, to show that judgments and decisions of courts must not only be equitable but also humanitarian. This is aptly found in the subtitle of this book: *per giudicare umanamente.*

The author places considerable emphasis on education as a preparation for Christian culture. This education consists both of religious preparation and philosophical development. Sciences are not to be neglected nor is the study of languages to be disregarded. In fact, Latin as a language is presented as the best instrument of human and Christian formation. Since Latin is perhaps the only common language among the students of the Rota school, it might be supposed that this language must necessarily be used. The author, of course, is not of this opinion and he establishes his view by showing the harmony, riches and logic of the Latin language. It is a matter of satisfaction to read this tribute for Latin is, unfortunately, disappearing from our curricula. The resultant harm to culture is incalculable.

Study of the juridical order is important in acquiring Christian culture. In this matter, the author properly considers the Natural

Law and the errors concerning it. Psychology and Philosophy in general are put in their rightful place in the hierarchy of studies.

For those primarily interested in Canon Law and its development, the few words of the author concerning Roman Law should be pondered long and seriously. There is really no substitute for Roman Law in the training of the canonist. This is proved time and again in even a cursory glance at the discussions found in some articles and books. The basic equity and temperament found in Roman Law are found no where else. Moreover, if the study of Roman Law is altogether necessary for the canonist, it is equally useful for the development of the civil lawyer. Everyone knows how seldom Roman Law is taught in the class-room. But everyone is not ready or willing to adopt remedial measures. This review is a plea to restore Roman Law to the class-room.

The work of Dr. Jullien should be read by all students of law. It will be a magnificent help toward obtaining the perspective of law in Christian culture and at the same time foster a decent respect for the city where this culture is best portrayed.

EDWARD ROELKER.

DOCTORAL DISSERTATIONS OF THE SCHOOL OF CANON LAW THE CATHOLIC UNIVERSITY OF AMERICA, 1916-1956

The following list includes all dissertations published or in course of publication up to the end of the academic year 1955-1956. For better orientation it has been arranged by topics, according to the main divisions and subdivisions of the Code of Canon Law, with the following subjects outside the Code placed at the end: Public Ecclesiastical Law, Canon and Civil Law in Particular Countries, Oriental Law, and History of Canon Law.

The dissertations were all published by The Catholic University of America Press, Washington, D.C. Those marked by the symbol † are out of print; those marked by the symbol †† are no longer in stock at the Press but can be obtained from the Canon Law Society of America or (for the numbers below 62) from *The Jurist*. The dissertations marked by the symbol * have not yet appeared in print.

The editors of *The Jurist* wish to express their appreciation to Mr. Peter L. Frattin, J.C.L., for his valuable assistance in compiling this topical list.

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